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The Changing Judiciary

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Stanley Forman Reed was an admirable judge and a faithful guardian of the United States Constitution. His accomplishments are traceable to the unique social and political background that shaped his character. This article dedicated to Justice Reed will explore some troublesome problems the judiciary has experienced with the passing of that political and social milieu.

First and foremost, Stanley Reed was the patrician son of Mason County, Kentucky, proud of his inherited land he farmed and traded as his ancestors had. The Reeds had come to Washington thirty years before this author met the Justice, but as with other Washington officials, "home" always referred to Maysville; the Washington quarters remained a suite of hotel rooms all those years. At the same time, this traditional and conservative man was an active participant as lawyer and judge in the great lawful revolutions of his time. The first draft of the Social Security Act was typed one Sunday on his office machine. To the lawyer who had learned oral advocacy defending the railroad before hostile juries fell the unenviable task as Solicitor General of the United States of defending the New Deal before an unsympathetic and unreconstructed Supreme Court. Later he was the second Roosevelt appointee to a new Supreme Court that became a central catalyst in transforming American law and life.

All Americans are the beneficiaries of the skill and responsibility with which Justice Reed exercised his power. His career of federal service illustrates the awesome degree of public authority America entrusts to its lawyers and particularly to its judges. Moreover, Stanley Reed's career, now complete, testifies to the ability of the traditional American community to produce wise social guardians.

Changes in American communities and in the organiza-

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tion of their judiciaries are undermining the supports that traditionally have guided individual judges' actions. At the risk of overstating the situation, the judiciary is being transformed into a group of professional technicians and civil servants operating within large centralized bureaucracies, cut off from supporting local, political and professional ties. For example:

Significant court reorganizations and consolidations in more than forty states have strengthened the power of judicial administrators at the state government level.[1] Consequently, local judges, once undisputed rulers of their own domain, are becoming employees in large organizations funded and managed from the state capitol.

The judiciary has experienced tremendous growth, with the number of state judges increasing by more than fifty percent during the past decade.[2] Accompanying this growth has been a reduction in what was once a source of status and strength, the uniqueness of the individual judge.

With the adoption of some form of merit selection of judges in more than thirty states,[3] the selection and retention of judges now depends less upon the judge's ability to maintain close personal ties with local partisan political figures.

Close connections between judges and local community leaders have been weakened by the Codes of Judicial Conduct published by the American Bar Association in 1972. These canons greatly restrict the extent of permissible judicial involve-

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[1] COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES, 1980-81, at 164-65 (1980); Schulert & Hoelzel, *Court Reform*, 60 JUDICATURE 281 (1977); Report, *State Court Progress at a Glance*, 56 JUDICATURE 427 (1973).

[2] In 1966 the total number of judges in state major trial courts was reported as 3,694. COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES, 1966-67, at 113 (1966). By 1976, this figure had risen to 5,750, an increase of more than 55%. COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES, 1976-77 at 93 (1976). By 1980, the reported figure was 6,680, an 80% increase over 1966. COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES, 1980-81, at 150-51 (1980).

[3] The uncertain definition of merit selection makes a precise count difficult, but some form of merit selection can be found in at least some courts in the following states: Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Utah, Vermont and Wyoming. S. ESCOVITZ, F. KURLAND, & N. GOLD, JUDICIAL SELECTION AND TENURE (1975).

ment in community, charitable and other public work.[4]

Last, the judicial workload has increased tremendously in most states in recent years.[5] As a result, assembly-line justice in many urban courts places a heavy emphasis on cost-efficient and speedy disposition of cases at the expense of coherent and deliberate consideration.[6] Time for reflection has de-

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[4] *See* ABA CODE OF JUDICIAL CONDUCT, Canon 5.

[5] The increase in judicial work can be roughly estimated by a comparison of the major trial court filings.

In New Jersey between 1966 and 1976 court filings increased 93.8% while the population grew only 22.5%. N. J., ANNUAL REPORT OF THE DIRECTOR OF THE COURTS 1975-76, xiv. In Oregon, circuit court filings increased 86% between 1965 and 1975 while the population grew 18%. ADMINISTRATION IN OR. 56 (1975). In Michigan, circuit court filings rose 78% between 1966 and 1976 while the population grew only 9.5%. REPORT OF THE MICH. STATE COURT ADMINISTRATOR, 1975-76, at 30. In Texas, district court filings increased during 1965-75 by 67.2% while the state's population increased 17.9%. TEX. CIVIL JUDICIAL COUNCIL, 38TH ANNUAL REPORT 1966, at 97; TEX. JUDICIAL COUNCIL, 48TH ANNUAL REPORT 1976, at 115. In California, superior court filings rose during 1966-76 by 53% while the population increased 14%. CAL. 1977 JUDICIAL COUNCIL REPORT 196. Finally, in Kansas the population was remarkably stable, increasing only 2.7% over the decade 1965-75, but district court filings during the same period increased 40%. STATISTICAL REPORT ON DISTRICT COURTS OF KAN. 5 (July 1, 1975).

It is reported that the population of the United States grew 36% from 1955 to 1979 while the number of court cases filed and disposed of increased during the same period about 1,000%. Uppal, *The State of the Judiciary* in COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES, 1980-81, 143 (1980).

[6] AMERICAN ASSEMBLY, THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION (1965).

As California Chief Justice Rose Elizabeth Bird told the International Academy of Trial Lawyers Convention in San Francisco on January 23, 1978:

> In some ways, the judicial system is faced with essentially the same problem which the industrial sector of our nation faced in the late 19th and early 20th centuries—how to deal with escalating demands for greater production. Industry's answer was to move away from the craft approach toward an assembly line operation. Production increased while unit cost decreased, and our nation was willing to bear the social costs of the often accompanying decline in quality.
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> . . . .
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> Today, these methods are spreading into the courts. We must begin to seriously consider what consequences will flow from mass production in a formerly individualized process. As the system is mechanized, people become inanimate objects to be processed. Judges, too, become grist for the computer mill, as they are transformed into "judicial position equivalents" and their work into "average minutes involved per filing" for the purpose of cranking out "weighted workload" results.
>
> Instead of running their own courtrooms, our trial judges become workers on the assembly line of justice, the captives of their caseloads, forced to measure their success by whether or not they have managed to dispose of

creased, and a respite from the bench for refreshment or renewal increasingly is seen as an extravagant luxury.

Many of these changes are concomitants of modern life. For judges, however, the increasingly centralized and bureaucratic qualities of modern life are particularly insidious because they threaten the autonomy that has been the traditional basis for entrusting to judges their most sensitive tasks.

I. THE IMPORTANCE OF JUDGES

A century and a half ago, de Tocqueville observed that "[s]carcely any question arises in the United States that is not resolved sooner or later into a judicial question."[7] While the few cases that eventually produce an appellate decision may have a great impact on society, in an important sense the vitality of the judiciary rests primarily on the daily work of trial judges. Scores of millions of civil and criminal suits are filed each year in the nation's courts.[8] In the totality of decisions in these matters, justice is given meaning.

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all the cases assigned to them on any given day. In large metropolitan districts, the courtrooms themselves begin to resemble factories—huge numbers of people packed into a court that seems always too crowded, waiting their turn to be die-stamped by the law.

. . . .

As in other governmental areas, the growth of bureaucracy in the courts has been accompanied by a growth in the impersonal nature of the courts and by a corresponding decrease in the judges' personal accountability and responsibility. We have to come to terms with an ever-increasing caseload, but we must be careful that our answer does not bring efficiency at the expense of a fair hearing.

Were the business of the trial courts simply efficiency, such a result might be desirable, but justice may be compromised in the process. The sense of participatory democracy that has characterized our courts in the past is destroyed as the contact between judge and citizen becomes a mechanized ritual rather than a personal exchange.

[7] 1 A. DE TOQUEVILLE, DEMOCRACY IN AMERICA 290 (1957).

[8] Nationwide figures on the volume and rate of lawsuits are not available. Extrapolating from three states to the nation at large, if Americans filed civil and criminal cases (excluding parking tickets) at the rate Californians did in 1976, then 64,700,000 would have been filed that year. If the nation became involved in lawsuits at the rate Texans did that year 70,439,000 would have been filed. On the other hand, if we became involved in litigation at the much more modest rate Kansans do, only slightly less than 4,000,000 lawsuits would have been filed. CAL. 1977 JUDICIAL COUNCIL REPORT; TEX. JUDICIAL COUNCIL, 49TH ANNUAL REPORT 1977; OFFICE OF THE JUDICIAL ADMINISTRATOR, ANNUAL REPORT ON THE COURTS OF KANSAS 1976.

In addition to private lawsuits, the aggrieved citizen may also enter the courtroom to challenge governmental action taken against his interests. Thus, officials are called upon to answer claims, just as private individuals must respond to lawsuits against them. The imposition of a tax, the denial of a license, the revocation of a permit and the zoning of a neighborhood are all subject to judicial intervention.

In recent decades, the courts have played a central role in lawmaking in America. Frustration with the inability of the politically-responsive legislative and executive branches to deal with embedded defects in society has led to greater reliance on the politically-remote judiciary for redress. Some critics argue that the balance of power has been upset and that the judiciary engages in too much lawmaking. This criticism has some merit, for in the past generation both state and federal courts have assumed an especially active role. As Judge Shirley Hufstedler, who wrestled with these issues on the United States Court of Appeals for the Ninth Circuit, has observed:

> We expect courts to encompass every reach of the law, and we expect law to encircle us in our earthly sphere and to travel with us to the alien vastness of outer space. We want courts to sustain personal liberty, to end our racial tensions, to outlaw war, and to sweep the contaminants from the globe. We ask courts to shield us from public wrong and private temptation, to penalize us . . . , to adjust our private differences, to resuscitate our moribund businesses, to protect us prenatally, to marry us, to divorce us, and, if not to bury us, at least to see to it that our funeral expenses are paid. These services, and many more, are supposed to be quickly performed in temples of justice by a small priestly caste with the help of a few devoted retainers and an occasional vestal virgin. We are surprised and dismayed because the system is faltering.[9]

Although the nation may decide that it has overbuilt its judiciary and that it must therefore cut back the tasks of judges to the more modest levels typical of other nations, the

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[9] Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 SO. CAL. L. REV. 901 (1971).

unpopularity of a few controversial decisions has not yet been translated into a political majority willing to so limit the judiciary.

A. *The Public's Expectations Regarding Judges*

When a judge rather than some other government official is given authority to make a decision, it implies a clear preference for having the decision made by a person who is autonomous, who can apply independent judgment to the matter under consideration, and who is relatively free from the most direct forms of political control and influence. Judges are deliberately removed from any clear set of rewards and punishments that might shape their behavior in particular ways. Judges who perform especially well do not get raises, nor are they likely to get promoted. They have no boss to call them in and pat them on the back or bawl them out. In our system, judicial decisions are individual judgments; they are not a result reached by a department, committee or commission.

Unlike other officials, judges are not just asked to follow the law; often they are expected to give it meaning. Unlike other legal professionals, they are not only expected to be correct and competent in their mastery of the legal rules; they are asked to choose the better rule and to express values in their choice. Beyond being responsible, judges are expected to be sensitive and sensible. People expect that judicial decisions should not compliantly follow public opinion polls. Judges are sworn to do more than obey the law: they are also asked to do justice.

The qualities prized in judges are not static. We conclude that a person is wise less from one good decision than from a pattern of decision-making over time. No one is always wise or always makes the best choices. Wisdom is something like batting in professional baseball. In either league the player who bats .300 consistently over a career is doing very well indeed.

B. *Selecting Wise Judges*

In the past, the selection and retention of judges has served as the primary occasion for insuring the quality of the judiciary. The selection of competent persons carries with it

an expection that those persons will perform well. Americans select their judges in a variety of ways. Despite the variations, two common characteristics of American practice are unusual to the rest of the world. First, nowhere in America are judicial appointments based on civil service examinations or on academic proficiency. In many countries, however, judges are appointed from a promotion list, based upon performance on an examination demonstrating technical proficiency in the law.[10] Second, while in much of the world judges are recruited upon successful completion of their university training, when they have limited practical experience,[11] nowhere in America are judges routinely selected at the outset of their professional careers. Instead, American judges, like their English counterparts, are appointed in mid-career and middle age. Becoming a judge is often dependent upon proven success in the practice of law. Thus, selection of American judges strongly emphasizes experience and wisdom in practical affairs rather than intellectual brilliance. Despite this emphasis on experience, uncertainty as to whether the selection process alone will safeguard the integrity of the judiciary is reflected in the practice, also unique to the Western world, of requiring judges to be re-elected or reappointed after each term of office. Yet these judicial retention elections, once required, tend to degenerate into merely pro forma ratifications, indicating a national ambivalence regarding their usefulness.

Throughout American history the method of selecting judges has been a persistent issue, and there have been a number of dramatic shifts in the favored method. History records an oscillation between an elite, tenured, highly professional judiciary, removed from direct partisan political pressures and a populist, responsive, partisan judiciary, drawn from a cross-section of the community, serving for a short term, and subject to popular recall.[12]

Although the early colonies had tended to regard lawyers with suspicion and to rely on judges with little or no legal

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[10] J. MERRYMAN, THE CIVIL LAW TRADITION 111 (1969).

[11] A. VON MEHREN & J. GOODLEY, THE CIVIL LAW SYSTEM 1148-49 (2d ed. 1977).

[12] E. HAYNES, THE SELECTION AND TENURE OF JUDGES 80-135 (1944); Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081 (1966).

training, the new states established a professional judiciary. Its members were appointed by either the governor or the legislature and held office for a long tenure, in a few cases for life.[13]

By the middle third of the nineteenth century, the dominant democrats were highly critical of an appointed judiciary that often frustrated popular reform, and they called for a more politically responsive judiciary.[14] Election of judges for short terms replaced the appointive process everywhere except in a few of the eastern seaboard states and in the federal systems. As new states joined the growing Union, each provided for election of judges.

Toward the end of the nineteenth century and the beginning of the twentieth century, nonpartisan judicial ballots, separate judicial nominating conventions, and direct primaries for judges became popular ways to mitigate partisan pressures, particularly where the Progressive movement had impact. Beginning in the second quarter of the century and continuing to the present, the bar's influence has been reflected in movements that have brought some form of nonpartisan, nonelective merit selection plan to at least thirty states. The trend toward merit selection continues, although some critics now ask just what constitutes "merit," while others question whether the committee system is an appropriate process through which to make these selections.[15]

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[13] F. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM 3-194 (1940); J. HURST, THE GROWTH OF AMERICAN LAW (1973); R. POUND, ORGANIZATION OF COURTS 26-90 (1940); Smith *An Independent Judiciary: The Colonial Background,* 24 U. PA. L. REV. 1104 (1976); Swindler, *Seedtime of an American Judiciary: From Independence to the Constitution,* 17 WM. & MARY L. REV. 503 (1976).

[14] *See* R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971).

[15] The crux of the merit system, in the eyes of its advocates, is the selection function of the commission.

> It is in this crux I find troubling. That is not just because I come from Washington, where skepticism about committees is almost as prevalent as committees; indeed, in Washington it is said that nothing is impossible—until you assign it to a committee. I am troubled by judicial selection by committee because it seems to me that two biases, or risks of biases, inhere in the process: 1) objective criteria will be given undue weight; and 2) to the extent subjective factors are considered, they will be value-free or technical ones.

This evolution in the process of selecting judges seems to have left America as ambivalent as ever on the issue of whether judges should be isolated and insulated from direct political pressure. Should judges reflect the majority sentiment in their community and be removed from office when they or the community depart from the majoritarian attitudes? Should judges, for example, be elected and retained on the basis of their views on abortion, on the use of busing to achieve school desegregation or on their announced toughness on the criminal defendant? Or should judicial elections depend upon the character, dedication and talent of the candidates? The heart of the problem is that for judges to be set apart, to be autonomous in their official actions, is always in conflict with notions of democratic popular sovereignty. The public wants judges to be independent, wise community leaders; at the same time, it is suspicious of that independence. That suspicion often results in attempts to subject judges to the kinds of democratic elective controls to which other public servants are subject. Interestingly, this uncertainty over whether judges should be wise leaders or responsive public servants has not led the public to view judges as mere technicians. Instead, the American experience provides eloquent evidence of a commitment to the view that judges are more than mere technical experts and that more is desired from a judge than information and intelligence.

II. THE BALANCING NETWORK OF JUSTICE

Almost every American courthouse has a physical reminder that justice involves a process of weighing and balancing. Atop the cupola of many of these older buildings, the blindfolded goddess stands with the sword of public power in

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> The temptation for committees to rely on objective criteria is obvious. Such criteria simplify the task of paring down long lists of names to manageable numbers. Moreover, they can avoid endless debates as to which candidates have demonstrated the best knowledge of the law, for example, by providing seemingly clear measurements.

Justice Thurgood Marshall, Address to the American College of Trial Lawyers, San Diego, Calif., March 14, 1977.

See also A. ASHMAN & J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION (1974); L. BERKSON & S. CARBON, THE U.S. CIRCUIT JUDGE NOMINATING COMMISSION (1980).

one hand and the balancing scales in the other. If justice were dispensed by a marble goddess, and if the process of justice involved only putting weights in balancing pans and letting gravity decide, the process would be less problematic. Justice, however, is dispensed by judges, of whom more is expected than human flesh can consistently provide. Judges must be experts in finding, interpreting and applying rules of law. A judge must be a master of procedure, expert in the details of pleading and evidence, and competent to supervise the technicalities of trial. These expectations indicate that the judge is primarily viewed as a senior member of the legal profession and suggest that what is considered the most important aspect of a judge's performance is professional competence, the compatibility of his behavior with the learning and traditions of the bar.

Judges are also government officials exercising public power, and they must follow administrative rules just as other officials must. A hierarchy of courts exists in which appeals courts review the work of trial courts to ensure that the rules are obeyed. Judges are expected to work hard, to be present in the office, to do a full day's work, and to carry their share of the court's caseload. In addition, judges, as public officers in a democracy, must account to the public for their exercise of power. Thus, in viewing the judge primarily as a public officer, the important inquiry into each judge's performance is whether he is orderly, diligent, economical and responsive to the wishes and policies of managerial supervisors and the electorate.

A judge must be wise while balancing that wisdom with sympathy, practical understanding and peace-keeping accommodation. It is hard to give precise meaning to these virtues, particularly in the uncertain situations judges face.

No human could hope to satisfy the apparently inconsistent demands on judges. Judges are expected to be decisive and firm but also deliberate and patient. They must be hardworking and efficient but not brusque or hurried. They should be dignified but not remote or lacking the common touch. Judges not only are subject to divergent expections, but they are also responsible to conflicting influential commu-

nity groups. The general electorate, the partisan political leadership, the professional leaders of the bar, the bureaucratic directors of the courthouse administration and the congeries of ideological, economic and class interest groups possessing community influence, all make their viewpoints known and their power felt. The judiciary has no dominant measure of job effectiveness and no single guardian to whom it must answer. Instead, each judge is pulled by a variety of divergent demands. Consequently, the system depends on the individual trial judge to sort out the signals, to filter the static and to balance the conflicts.

III. THE BALANCING NETWORK OF POWER

The image of balancing has another connotation for the judiciary, for the strategy used in America to preserve free government has been to make power safe by dividing it and to keep it safe by preventing any of those who share it from overpowering the others. This strategy has been applied throughout the allocation of political authority. Those who wield power are never free from the need to account to and to gain the approval of the other branches of government, but each branch is autonomous within its own sphere.

American political thought and practice recognize and preserve the separate identities of diverse groups that exert influence within the community. By forming coalitions with competitive groups, these groups assert their special interests and thereby influence government. Successful American political parties are coalitions of diverse groups that balance their desire for independent action against their dependence on other groups with overlapping interests. Thus, a free and dynamic society is maintained by recognizing the legitimacy of special interests and by balancing the influence of one against the others.

This strategy of balancing conflicting views is consistent with the common law preference for judge-made rules. Common law permits the currents of different attitudes to be heard and absorbed. It is not systematic or ideological, nor does it deduce its rules from abstract principles and codes. Instead, it pragmatically seeks to build social order from the

conflicts of disorderly experience.

Similarly, the American judiciary was organized to serve our concept of highly decentralized and limited government. The newly created states became the basic units of lawmaking and administration, but the judiciary took on a highly local flavor. Rather than being a state government delegate in the locality, the judge was locally selected and served only in a specified territory. In contrast to the English model, the justice of the peace, who disposed of most minor judicial business, was not the governor's man in town. He was the town's man, locally selected and largely free of direct outside supervision. The administrative accountability of judges was nominal. Judges were not co-workers in a single judicial organization. Each sat alone, with the county, and not the state, paying his salary and other expenses. If the judge in a particular county was overworked, no one could assign some of this work to a judge in a neighboring county with little work of his own. In courthouses with more than one judge, collegial courtesy rather than administrative power was likely to govern the relations between the judges.

The organization of justice in America has been built upon a small cadre of judges. Each town or county selects a small number of judges to serve, and each judge gains importance from the rarity of the judicial status. The small size of the judiciary becomes apparent when viewed without the large number of part-time, nonprofessional judges of limited or special jurisdiction. Only 7,000 to 10,000 full-time judges serve a nation of over 220,000,000 persons.[16] Thus, American judges constitute a remarkably small part of the legal profession. Only one to two percent of this country's lawyers are full-time professional judges. This contrasts with other nations such as France, Germany and Sweden, where about one-third of the

[16] In total there are about 25,000 judges in this country, but well over two-thirds of them are judges of courts of limited or special jurisdiction, many of whom work part-time on traffic and other minor cases. U.S. DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN., NATIONAL SURVEY OF COURT ORGANIZATION 2, 5 (1973 & 1977 Supp.). In the U.S. there are roughly 45 judges per million population. In West Germany it has been estimated that there were 213 judges per million population in 1973. E. JOHNSON, A COMPARATIVE ANALYSIS OF THE STATISTICAL DIMENSIONS OF JUSTICE SYSTEMS OF SEVEN INDUSTRIAL DEMOCRACIES Ch. IX, Table I (1977).

lawyers are judges.[17]

Judges had no controlling supervisors, but this does not mean they were free-floating in space. Instead, they were constrained by their responsibility both to the local community and to the law to consider pending matters independently. Traditionally, autonomous judges were central participants in a network of ties connecting them to the local community, to its political organizations and to its lawyers. The judge was a community leader, active in its affairs and drawn from among its influential lawyer elite. He needed the backing of the political leadership of the community to be selected as judge, and he had to preserve the goodwill of that leadership to retain the position. Through this network, courthouse constituents relayed their views on the effectiveness of the judicial system to the individual judge. Within this network, judges were not relieved from all inducements and pressures that might influence their behavior, but theoretically the network was balanced so that no single influence overpowered the others. The dynamic balance of this network both supported the judges and gave them a sense of position, perspective and limits. Thus, judicial autonomy depended not upon leaving judges alone but upon maintaining the balance of diverse demands on the judge. This balance was achieved by providing the individual judge with the continuing information needed for self-direction.

IV. THE CHANGING COMMUNITY

An eminent legal historian has noted that "[i]n 1950 state courts had about the same structure and powers that they had one hundred years before."[18] Since 1950, however, there have been remarkable changes in the organization of the judiciary in virtually every state of the nation. The political structure of state courthouses is built upon the assumption that each community will have only a few judges who will live and work in

[17] In West Germany there is a judge for every 1.96 lawyers in private practice, in France a judge for every 2.46 private practice lawyers, and in Sweden one for every 1.94. *Id.* at Ch. X, Table I.

[18] W. HURST, THE GROWTH OF AMERICAN LAW 88 (1973).

close contact with the bar and the local political elite. This system operates well so long as the ties between important political constituencies in the community and key officials, including the judge, are close and provide constant communication. There is ample basis for objective skepticism about this model, however. Changing patterns of growth and new political styles have produced communities that are organized very differently from those of the preceding generations. Urbanization and suburbanization have affected both large and small communities, with the result that there is less consensus on social values. The conflict among divergent points of view is sharper, even in small communities. While substantial variations in values always have existed, it is considered more appropriate to assert these divergent points of view. Eventually these divergent points of view are brought into focus in the courthouse.

The judge of an earlier day was the leader of a close and closed community that now is changing in size, shape and structure. The community at one time was basically rural, with an economic base tied to land and locality, but now the community is part of a national or world market. The members of this new community are highly mobile, and communications have improved to the point where group identification with people outside the community frequently is easier than preserving ties to those within the community.

Despite these changes, most local courts still retain a simple organizational structure with one or a few judges and a central file system. The judges or "courts" share a common building, but for all other purposes they each do their own work. In metropolitan areas, by contrast, a score to several hundred judges preside over a tremendous number of lawsuits. The work of this complex organization is coordinated by calendar systems that schedule and allocate the tasks of individual judges. Court clerks may number in the thousands, and they work for the court system rather than for an individual judge.

Courts have also been affected by the general crisis in local government that is evident in many areas of American life. In the courthouse, as elsewhere, the major dimension of this

crisis has been fiscal, as local governments have struggled to meet increasing demands for services from a narrow revenue base largely derived from the taxation of real property. For the judiciary, this crisis appears not only in a perennial shortage of funds for administrative support but also in the form of pressure to shift fiscal responsibility for the courts from the local to the state government. The result is that the local-based judiciary, which depended upon the county government for fiscal support and oversight, has been transferred to a state-based court system funded from a state budget and controlled by a statewide administrative structure. As local governments find it harder to meet increasing fiscal demands, there are strong incentives to give up the cost of the court and concomitantly to surrender control of the courthouse. When fiscal responsibility shifts, a shift in administrative control inevitably follows.

V. THE CHANGING JUDICIAL WORKLOAD

Different communities generate different lawsuits. The pace and pressures on some urban judges are overpowering as they attempt to cope with tremendous amounts of work. In contrast, the small, traditional community generated only a modest amount of litigation. Most cases arose out of private property disputes and petty crimes. The cases tended to be relatively simple and the court did not sit constantly. Generally, court was in session for a few days or a week four times a year. The assumption was that judges would dispose of cases by trial, often with a jury. The judge in a small rural community often was likely to know personally the lawyers who came to court. Attorneys, not the judge, managed the pretrial stages of litigation. The lawyers filed pleadings, discovered the evidence and brought the case for trial. The judge tried the cases as the lawyers brought them in, thereby achieving an economical use of a small number of judges. A court need not grow very much, however, before problems will arise in this simple managerial scheme. As soon as judicial business requires more than one judge, the court must devise some method to allocate work among the available judges. As the volume of work grows, schedule conflicts are more likely to arise, and manag-

ing dockets and calendars becomes a full-time job for an office of clerks.

As a community grows, the judicial workload grows even more rapidly. Larger communities produce more lawsuits, and their disputes often are more complicated. Today's judges are often in session all day, five days a week, at least ten months a year. The modern trial court has aptly been described as an assembly line.[19] More complicated cases involve time-consuming preliminary motions, lengthy trials, and extensive preparation. As cases become more complex, attorneys come to rely heavily on time as a weapon, using maneuver and delay to confuse the opposition, to induce an advantageous offer of settlement, to forestall an inevitable conviction as long as possible and to avoid paying today what one would prefer paying tomorrow. The more complex the case, the more opportunities exist for delay.

As the judicial workload increases, the judge is less able to force cases to trial. This is important because the credible threat of trial is probably the most effective incentive to a settlement between the parties. For at least a century, settlement has been the predominant method of disposing of cases in most courts. Judges try only about one civil or criminal case in ten; the rest are settled out of court.[20] Criminal cases are dismissed by the prosecution, or the defendant pleads guilty. Civil cases are abandoned by the plaintiff with or without a financial settlement by the defendant. When a court relies upon disposition by settlement, the volume of work in the court becomes significant, because the existence of a backlog reduces the ability to threaten a trial and increases the opportunity to delay and avoid trial.

In the simple courthouse, the attorneys' control over the preparation and presentation of cases relieves the judges of

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[19] See note 6 *supra* for one jurist's analysis of the similarity between the assembly line and the modern court.

[20] Of the 552,000 dispositions in California Superior Courts in 1976-77, excluding those dismissed for lack of prosecution, only 10% involved a contested trial and 1.4% a jury trial. CAL. 1977 JUDICIAL COUNCIL REPORT Table XVIII-A, at 204. A Federal Judicial Center study of federal district courts in 1975 found that complete trials occurred in 12.9% of all dispositions. INTERIM REPORT, DISTRICT COURT STUDIES PROJECT 37 (1976).

administrative burdens and allows a small number of judges to run the system. As the work and size of the court increase, an attorney's ability to paralyze the process by dilatory maneuvers creates new needs for administrative control of the process and becomes the source of new problems.

Further, as the judiciary grows, a hierarchy develops among the judges. Traditionally, the title of chief judge was conferred on the basis of seniority and was largely honorary. The chief judge would preside at the judges' occasional meetings to decide court business. His major job was to gain judicial consensus. In a number of courts, however, this model is being replaced by professional management, responsible for the daily supervision of the courts. The chief judge is relieved of other judicial functions to devote full time to supervising the judicial operations of the court. Today's chief judge is not merely a genial presiding officer; he is likely to have substantial authority to assign judges to specific cases. Such a chief judge has power to reward and punish judges in order to gain compliance. The presence of an increasingly powerful administration creates new questions as to what is appropriate judicial performance. Individual judges now must deal with bureaucratic superiors who supervise and review their work, award promotions and impose discipline. Thus, while independent judges were politically accountable in ways that enhanced the quality of their decisions, today's overly administered judges may be held accountable in ways that threaten to erode the quality of decisions.

VI. THE THREAT OF COURT ADMINISTRATION

Court administration plays a paradoxical role, for court management is a part of the solution to the problems presently confronting judges. At the same time, however, administration creates new problems for an autonomous trial judiciary. Without improved administration, it is doubtful that courts can cope with a growing and increasingly complex caseload. But when managerial concerns dominate the judiciary, individual judges gradually are reduced from independent community leaders to civil servant technicians.

Trial judges are particularly sensitive to administrative

pressures, which operate directly on them through the administrators' power to assign judges to jobs within the court, to control the budget, and to assert a growing influence over judicial promotions. As these pressures mount, the indirect and informal network supporting autonomy becomes overwhelmed, distorted and ultimately displaced. As a court develops an increasingly bureaucratic organization, its leaders begin to believe that judicial autonomy belongs to the system, not to the individual judge, and that the judge's proper loyalty is to administrative superiors, rather than to the complex network of constituents. Doing justice in such a setting becomes equated with doing the organization's work. Management tends to focus on matters it can count and report on, at the expense of subtler qualitative dimensions of the decision-making process. The maintenance of judicial quality depends upon striking a balance between quantitative management control and the qualitative view of court effectiveness.

Court administrators tend to separate the process of moving a dispute through litigation from the process of adjudication, the case-deciding function of judges. Consequently, cases are reduced to interchangeable units of equal value in an accounting system. As a result, statistical reports that count the number of cases in various categories represent the primary measure of effective court operations. Managerial problems gain independent significance; backlog, delay and poor use of courtrooms are viewed as problems requiring special solutions. Virtually every major trial court in America invests great amounts of time, talent and money in administrative matters. Voluminous reports, ambitious structural reforms and complex electronic equipment are harnessed to deal with management problems. But management makes no reports on the impact these administrative practices have on the quality of decisions, nor does it report the extent to which these decisions conform to the community's sense of justice or the law's need for growth.

Court management invariably views individual courts in terms of a larger "system," which may include all the judges in a courthouse, in a community or in a state. The inevitable result is that administrators no longer see the judge as an in-

dependent actor. The traditional jurist may have been idiosyncratic and often autocratic, but at least these qualities emphasized the importance of what was done by the judge. When the administrative organization becomes the center of attention, however, the judge's role is altered. These administrative interests capture the judge's attention, for management has direct power to reward and punish the judge. The indirect pressures exerted on the judge, which operate through the informal influence of traditional community ties, diminish by comparison. Ultimately, preoccupation with court management becomes a threat to both judicial autonomy and effectiveness. If every docket in every court in America were up to date and if every court were disposing of cases with optimal efficiency, nothing meaningful would be accomplished unless good decisions were made in individual cases. Nothing is gained by mandating change in the name of efficiency if judges focus their attention on the concerns of management rather than on the concerns of justice.

VII. THE CHANGING JUDICIAL ROLE

The physical setting and the etiquette of judicial procedure can produce in judges a sense of infallible authority that provides little inducement for critical self-evaluation. Both inside and outside the courtroom, judges are set apart and treated with respect. They must deal with the magical aura of their robes and bench. Unless judges can maintain a realistic sense of their own limits, they may behave in a preemptory, superior, overbearing and parental manner.

Since a major feature of a judicial career is status and position, many people choose to become judges because the idea of having power and authority attracts them. Possession of authority is a psychological fact in a judge's work life. Those who deal with a judge respond to that power in both rational and irrational ways. They fawn, defer, challenge and rebel. They project on the judge many of the expectations and feelings they have nurtured toward parents, teachers and other familiar authority figures.

In reality, however, this powerful psychological authority is counterbalanced by the adversary system of litigation in

which the parties and their lawyers conduct the lawsuit. Judges are expected to disguise their power with a neutral, passive mask. The lawyers, rather than the judge, frame the issues, gather and present the proof and do most of the talking in court. The judge decides the issue but with the assistance of the litigants and their lawyers, who are responsible for conducting an independent investigation to uncover the evidence relevant to the issues.

Continental European judges play a quite different role. They are likely to serve on panels considering a case rather than sitting individually. Further, the European judges play a significantly more active part in trial.[21] The judges and clerks assemble a dossier containing the legal arguments and factual proof of the parties. Counsel may suggest witnesses to be heard and questions to be asked, but the judges decide whether the evidence presented either by the parties or through the judges' own investigation is sufficient. The active inquisitorial participation by the judges continues throughout the proceedings. In a criminal case, for instance, even the confession of the accused will not excuse the continental judge from conducting a full independent investigation of the facts. In the American adversary trial system, however, judges are permitted to consider only the evidence presented by the parties and then only within the limits of rigid rules of evidence. In continental systems, rules of evidence and procedure are quite simple and are left largely to the common sense of the judge.

Judges are less likely to encounter in their work the kinds of rewards and sanctions found in most types of employment.

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[21] A clear description of the operation of the German procedural system in a civil case is found in Kaplan, von Mehren, & Schaefer, *Phases of German Civil Procedure,* 71 HARV. L. REV. 1193, 1443 (1958). *See also* Damaska, *Presentation of Evidence and Factfinding Precision,* 123 U. PA. L. REV. 1083, 1088-95 (1975); Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany,* 87 YALE L.J. 240 (1977); Rosett, *Trial and Discretion in Dutch Criminal Justice,* 19 U.C.L.A. L. REV. 353 (1972).

The Goldstein and Marcus study suggests that even in Europe, where the judge is supposed to be active, he is likely not to be so. This suggests that the apparent contradictions between the formal authority of the judge and the dominance of the advocates and parties is not limited to our system. J. MERRYMAN, THE CIVIL LAW TRADITION (1969).

Judges do not have bosses watching, directing, correcting, praising and threatening them. Although other professionals, such as doctors, lawyers and professors also work alone, judges, unlike other professionals, lack clear affirmative rewards for performance. Promotion within the judiciary is a growing but still unlikely prospect; furthermore, many trial judges would not consider promotion to an appeals court a reward. Realistically, appointment to the bench is a terminal appointment; few judges are promoted, and fewer are forced from office before death or retirement. Moreover, judges' salaries are fixed and may not be reduced during their terms of office. Relieved of the danger of demotion, they also surrender most hope of advancement.

In the past, a judicial position was often one phase in the development of a political career. A successful, elected official might run for an elective judgeship, retain the position for a while, and at the right moment run for a higher elective office. Changing standards of judicial behavior make maintaining partisan political contacts harder for judges, since judges no longer can be actively involved in party affairs or fund raising.[22] As judicial selection and retention is removed from partisan politics, becoming a judge requires one to step out of the political arena and makes it less likely that one will be able to step back in later.

Most judges would consider returning to a law practice undesirable, particularly if the judge has served on the bench for a number of years. The judge is likely to feel ill-equipped to return to serving the needs of private clients. Consequently, some judges have an uneasy feeling that there is no alternative for them if the judicial office no longer occupies their interest.

Becoming a good judge typically requires substantial changes in professional personality, self-perception and habits. One becomes a judge in our system, not at the beginning of a career, but only after demonstrating competence as a lawyer. For most purposes, being a good lawyer and being a good judge involve very different working personalities. These dif-

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[22] ABA CODE OF JUDICIAL CONDUCT, Canon 7.

ferences were succinctly described by a leading California attorney, who is the husband of a distinguished former federal judge:

> We all know that what you see depends upon where you sit. And some changes of scene are more critical than others, but I know of none more likely to change one's personal views than by walking around a simple table, climbing three little steps, and donning a black robe.[23]

Lawyers, particularly the trial bar that forms the nucleus of the bench, are a notably ambitious, competitive, striving group. They lead active and often combative lives. They orchestrate trials in a way that displays their own special talents. The activity is inherently social, and the rewards for success are open-ended. Top-ranked lawyers are paid handsomely, are honored professionally and can possibly rise to the stature of folk-heroes.

Trial lawyers are not office lawyers; they are often out and away from their desks. Unlike their colleagues practicing probate or tax law, litigators are not always expected to be available. Their time can never be too tightly structured; they may work day and night for weeks preparing and presenting a trial. Yet on other days, when the case that was scheduled to occupy all their time is settled or adjourned, they may return to the office to catch up with paperwork or may simply take the afternoon off.

When a litigator becomes a judge, however, he finds himself physically confined to the courtroom and chambers. The judge's staff must keep track of him because administrative judges or lawyers often come unexpectedly to his chambers to have an order signed. No one is disturbed when an attorney plays golf in mid-afternoon, but changing expectations of judicial performance make an increasing number of judges uncomfortable about spending time away from their desks.

Pressures of time and calendar require the judge to focus only on what is presented, without looking too far afield. A day's calendar may contain dozens of matters. The distance and inequality built into the judge's position of authority con-

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[23] Hufstedler, *Professional Expectations*, 15 JUDGES' J. 74 (1976).

strain the judge's opportunities to deal with people directly and sympathetically. Procedural limits inhibit the judge from interfering with the flow of the preceedings. Individuals who appear come sharply into focus only for a few moments and are whisked away to be replaced by new people and new issues. There is no opportunity for a relaxed interview, for insightful probing beyond the superficial contact required by procedural rules. In time, judges eventually develop a patterned approach to match the work.

An interesting and well-presented trial remains a fascinating experience for the judge, but few judges spend much of their time with such cases. Most of the judge's work is routine and eventually boring. The judge probably appeared as counsel in the routine cases as a young lawyer, progressing to more interesting matters as he developed his craft. The successful lawyer may hire a younger associate to handle the less interesting cases or may refer such cases to other attorneys. Judges, however, have no such option. They are charged with deciding all cases brought before them; they cannot refuse a case, nor can they hire a substitute to sit on the bench and listen to bumblers wrestle with the insignificant.

In order to adapt to this passive role, some judges cultivate a judicial image. They read more, analyze the law in greater depth and find other appropriate outlets to express their training and wisdom. Some of the judges respond to the sense of isolation, constriction and frustration inherent in the position by focusing on the people who appear before them. These judges increasingly view their jobs as positions in a people-service industry, with this aspect taking precedence over the administrative and legal facets of the task. Still other judges respond by seeking power either as a chief judge or as an administrator. Some judges become alcoholics or otherwise burn out. Most judges value their rare opportunities to speak in the name of higher values, to listen to a mundane dispute and find it suddenly lit by a flash of principle. These opportunities are the judge's triumphs, but they also suggest the judge's core problem. Perhaps the most striking observation made by judges the author recently interviewed was the discrepancy between their expectations of the job and its daily

realities. Their work is physically restricted and sometimes isolated. They must hear routine matters, presented by lawyers who do not meet their standards of professional performance. Many judges also are troubled by the degree to which the security of their position takes on the qualities of a dead-end. There are too few great moments and too many boring days. Having arrived at a safe harbor, they miss the adventure of the voyage.

VIII. THE CHANGING LAWYER-JUDGE BALANCE

The problems which judges must cope with are aggravated by the shifting balance between the judiciary and lawyers. The relations between judges and lawyers are close, and they are mutually dependent. Lawyers are the strongest interest group influencing the judiciary. Lawyers are very influential in deciding who becomes a judge, and they are a major source of judicial campaign contributions. Lawyers have a direct and daily interest in both the quality and efficiency of court operations.

The American judicial system has functioned with a relatively small judiciary by relying on lawyers to do much of the work assigned to judges in other legal systems. Such a system emphasizes the uniqueness of the judge. The lawyers are primarily responsible for organizing and presenting the case and are also expected to educate the judge regarding technical matters of law. The judge brings to each case a broader perspective, wider experience and relative freshness. It is both a glory and an absurdity that a federal district judge may hear in rapid succession a constitutional claim, a technical tax or patent matter, a seaman's personal injury claim and a check forgery charge involving a Treasury check for $3.98. The judge can absorb this variety because it is the lawyer's function to brief the judge on the specifics needed to decide each case.

The lawyer-centered system is not without its costs. Judges are forced to maintain the good-will of the lawyers who facilitate their work. Indeed, a good judge might be defined as one who can keep the lawyers happy and productive. This can be accomplished so long as the interests of the lawyers and the judge are identical and the interests of all are

advancing justice. The highly adversary perspective of lawyers, however, leads them to place their client's particular interest above broader social interests. Moreover, the existing system often gives the lawyer a direct economic interest in prolonged and expensive litigation. Perhaps an inevitable consequence of lawyer domination is that the process will become structured to maximize the lawyers' interests at the expense of the interests of the judiciary, the litigants and the general public. In too many lawsuits the only victors are the lawyers, and the costs of litigation are a major portion of the amount in dispute. As lawyers become more of a special interest group, their control of the process becomes a threat to the judge's sense of direction and to the quality of the judicial product. A balance needs to be struck to enable the judge to assert social interests more emphatically in the face of the lawyers' particular interests.

CONCLUSION

The forms of accountability most used in the past, which relied upon the vitality of the local community and its dominant political groups, are no longer sufficient to support the judge. The decline in traditional methods of insuring accountability does not mean, however, that courts now operate in a political vacuum. As the role of the local community has diminished in importance, political power has shifted to an emerging judicial administration and to the lawyers who control the court's litigation. Thus, the weakening of extrajudicial accountability has been matched by the growth of new forms of accountability within the judicial organization. This has not been a simple cause and effect relationship, but the two phenomena are connected. A major argument against the old political order was that it was inefficient and was not organized in a business-like way. Once established, the new court management, however, is likely to be a major advocate for changes that will undercut the old political patterns. Moreover, a new political structure arises to allocate power within the emerging managerial hierarchy. Increasingly, the administration has the power to give out rewards within the judiciary. It assigns the judges, controls the budget, authorizes vacation and travel,

and, in several states, influences the promotion of judges to higher courts.

The new network of bar and administration is seldom overtly partisan; nonetheless, it is political. The power of administration is enhanced by its apparent necessity—it promises the public a judiciary that can cope with modern conditions. Judges need the cooperation of the lawyers to dispose of the cases. At the same time, the new network presents a threat to the autonomy of the individual judge and distorts the quality of the judicial product. Administration imposes measures of technical competence and efficiency that often undercut the quality and content of decisions. Trial lawyers usurp the judge's authority to decide cases by their control over the calendar and settlement, thereby replacing the judge's deliberated justice with their own particular interests.

The declining influence of local politics, the ascending power of the administration, and the shifting lawyer-judge relationship all suggest that judicial accountability needs to be supplemented with the return of a stronger voice for constituencies outside the system. Assessment of the judge by the community in which the court operates could be an important tool to redress the balance of political influences on the judge and to maintain the political accountability of the individual judge. This in turn strengthens the judge, because his exercise of power is legitimate. Thus, he is in a better position to speak for the law and the values of the community and is better equipped to resist those forces that would make him their servant.