REALITIES OF URBAN CRIMINAL JUDGING

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This article is excerpted from the forthcoming book entitled, BEYOND A REASONABLE DOUBT: AN INQUIRY INTO THE INNER WORKINGS OF OUR URBAN CRIMINAL COURTS. *The project is the culmination of twelve years of research into the operation of the American criminal court system. During this period the author was involved in five national studies which permitted him to interview approximately five hundred judges and lawyers in fourteen major cities. From 1976 to 1978, the author was a Visiting Fellow at the United States Justice Department's now dormant Law Enforcement Assistance Administration. Although the data reported are the result of observations and interviews conducted throughout the 1970's, the most critical information concerning the professional behavior of the judiciary was gathered between 1979 and 1982.*

From the perspective of the layman, the life of a judge appears to be one of high status and privilege. It is viewed as a well-respected profession which offers one the opportunity to pursue an altruistic aim—the attempt to reach fair and just judicial decisions—while enjoying a comfortable salary and pleasant working conditions. The public imagines the judge arriving at his specially designated parking space a few feet from the courthouse entrance in time for the leisurely commencement of courtroom business at 10 a.m. Upon entering the courthouse, doors are held and deference is extended as the judge moves toward his chambers, exchanging morning salutations with a seemingly endless line of well-wishers. The royal treatment continues in his spacious, elegant offices as his secretary brings him his already sorted correspondence along with a cup of coffee. His law clerk also is ready for the judge's morning appearance as legal memos, schedules, and other bits of critical information are officiously presented. Following a perusal of the morning paper and a brief ordering of the day's business, the judge is helped on with his robe and strides purposefully into the courtroom where the bailiff announces his arrival and demands immediate subservience.

Once in the courtroom, seated above all other participants, the judge's power and status reach even greater heights. Lawyers, defendants, witnesses, and the courtroom audience all stand in awe, carefully trying to curry his favor. After a two to three hour morning

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session, the judge returns to his chambers for lunch, which his office staff has obtained for him. By 2 o'clock the judge is back in the courtroom, where he will eloquently orchestrate the proceedings before him for the next two hours. Following a conclusion of the day's business, the judge will retire briefly to his chambers to catch up on the latest mail and gossip, and by 5 o'clock is on his way to his palatial residence to dine and socialize with entertaining personalities. The summers mean two-month vacations and shorter working days. The winters are interrupted by professional meetings in the Caribbean and long weekends in Vermont.

Very few of the criminal court judges observed during the past decade experienced the pleasant and productive existence described in the preceding paragraphs; their working environment contained few of the amenities just mentioned. Instead they found themselves in chaotic working situations where mounting caseloads, public pressures, and dismal surroundings forced many of them to contemplate early retirement.

Although this article will focus upon the strains and hardships facing criminal court judges, it may be useful first to discuss some of the positive attributes of their job. Given the abundance of negative factors undermining a judge's professional existence, what satisfaction do the members of this beleaguered group derive from their positions? Most judges apologized for the altruistic nature of their response to this question, but nevertheless stated a sincere belief in their ability to serve the community. Within the context of a criminal proceeding, this usually is translated into the judge's belief in his capacity to reach a just and fair decision: a decision which will be in the best interests of both society and the defendant. Judges seemed confident that they could protect the defendant's constitutional guarantees from even the most aggressive prosecutor, while also protecting the community against a criminal element.

In fleeting moments of candor, several judges did admit that they enjoyed the status and deferential treatment associated with their lofty position. It was nice to have doorways opened and crowded hallways suddenly passable as they moved through their judicial domain. In addition to such niceties, the loyalty of the judges' staffs, extending from bailiffs through secretaries and law clerks, is another factor permitting them to have a clear sense of their power and prestige. Even though sociologists inform us that the status of judges, particularly at the local level, has declined over the past few decades, most of the judges believed that their professional status was still elevated and that most members of the legal community remained both envious and respectful.

Several judges found that the intellectual challenge of their job was its most attractive element. These judges were excited by the constantly changing nature of the legal conundrums confronting them each day. How could they effectively balance the needs of society against those of the defendant's personal tragedy? How were they to interpret the subtle and changing rhythms of the Burger Court as it attempted to erode the decisions of the Warren Court? The case law explosion at both the state and federal levels has driven judges, defense attorneys, and prosecutors into law libraries in order to keep up with the most recent decisions. As one Denver lawyer recounted to me in 1977, " 'You must subscribe to everything and go to all the seminars and collect all the advance sheets. It is crucial to pay attention to your clients, but you must also pay attention to the intellectual side of the criminal law.' "[1] Time after time the senior lawyers harked back to the pleasures of the old days when a criminal lawyer could practice "out of his hat," but then noted that those times were long past.

Despite the positive feelings many criminal court judges held toward their positions, they were upset by what they perceived to be several major liabilities in their professional lives. Although this article will examine a wide range of problems and hardships troubling criminal court judges, the three following factors were repeatedly emphasized by most judges as being the most unpleasant aspects of their jobs: inadequate compensation, forced involvement in politics (that is, the necessity of winning nominations and elections), and dismal working conditions.

Felony court judges in the cities visited earned from $40,000 to $75,000 a year. To the general public this figure may seem to be an impressive salary for a public official. The judges interviewed, however, were nearly unanimous in their belief that their wages were inadequate. Most judges explained their dissatisfaction on the basis of the significantly higher salary they thought they could be earning if they had remained in private practice. The judges felt that on the average they had suffered a fifty percent reduction in wages by joining the bench, and that the differential between their judicial salaries and their earning capacities as private practitioners was growing wider with each passing year. Exacerbating the financial pressures was the fact that most judges, being in their late forties and early fifties, were the parents of children about to enter college. The reality of having to finance this extremely expensive investment in higher education made nearly all of the judges keenly aware of their financial limitations.

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[1] P. WICE, CRIMINAL LAWYERS: AN ENDANGERED SPECIES 102 (1978).

Several judges stated that because of these monetary pressures they could afford to serve only one term on the bench, and would then return to private practice. Judges also pointed to the difficulty of readjusting their lifestyle as a result of taking this fifty percent reduction. They and their families had become used to a certain standard of living which, once experienced, was difficult to give up. In addition, there were previous financial commitments such as the mortgage payments on a home which still had to be paid despite the reduced salary.

A few judges interviewed in each city were cynical about the financial losses claimed to have been suffered by their colleagues as a result of joining the bench. These judges thought that a large number of their brethren had not been financially well off prior to becoming judges, and actually had received increases in salary as a result of their new positions. These judges were frequently products of a highly politicized system of judicial selection and received their appointments as a result of many years of loyal party service. They had frequently held bureaucratic positions within city government which paid less than their present salaries. If they had been associated with law firms, such associations were usually in name only. Their legal work was more likely business-related, typically in the area of real estate or insurance, and rarely amounted to incomes approaching those which they currently earned on the bench.

How many judges actually have suffered significantly as a result of joining the bench? How many have profited from this move? These questions are almost impossible to answer. What can be concluded, however, is that a large proportion of criminal court judges perceive themselves as being underpaid. When judges believe that they are not being sufficiently compensated and are thereby relatively deprived, their attitudes can have a negative effect on their job performance. It seems quite plausible that the judges who complain most about their salaries are the ones least likely to devote themselves unselfishly to their professional responsibilities.

A second major liability for most judges is the necessity of becoming involved in local politics. Even though judges serve lengthier elective terms than legislative and executive officials, many resent having to enter the political arena at all. This was especially true for judges who had been successful private practitioners before reaching the bench, and who had only a passing exposure to local politics. They had allowed themselves to be considered for judicial office out of a sense of civic duty and felt that it was unnecessary and even degrading to have to "dirty" themselves in the political process. The political rallies, fundraisers, and closed-door strategy sessions were all despised

diversions from their primary goal, which was simply to decide cases and serve their cities. Whether the selection process was by election or appointment followed by retention elections, the judges were required to participate in the political process and interact with the local party leadership. Lawyers who were interviewed in several cities cited their unwillingness to enter the local political scene as the primary reason for their reluctance to become judges, despite being likely candidates for judicial nominations.

The third major problem which upset and depressed a high percentage of judges revolved around unpleasant working conditions. Even in cities such as Washington, D.C. and Los Angeles, California, where courthouses are relatively new, impressively furnished facilities, judges complained about their working conditions. Crowded calendars, inadequate staffing, and ineffective security are the most common manifestations of these undesirable conditions. The physical deterioration of a majority of criminal courthouses has also contributed to the depressing setting. These older facilities, with inoperative telephones, overflowing trashcans, clogged toilets, and paint peeling from their institutional green walls serve as visible reminders of the low status accorded to even the most prestigious criminal court judges.

Many judges came to the bench from lucrative private practices where they were accustomed to luxurious working conditions, including opulent and spacious offices. They were typically served by competent legal secretaries, a bevy of eager law clerks, and young associates who were anxious to please. The judges who reached the bench from these impressive law firms were usually the most upset over their new working conditions. They could not fathom the paradoxical nature of this situation in which they were forced to suffer a degrading reduction in the quality of their work environment as a "reward" for achieving their elevated professional status.

Even more troublesome to most judges than their depressing physical surroundings was their vulnerability to physical attack as a result of the absence of reliable security measures. Nearly every judge interviewed recounted some incident experienced by himself or one of his colleagues. While these incidents varied in seriousness from verbal abuse to aggressive assaults, all were terrifying. Presently, any judge who works after dark may request an armed escort to his car. So many courts are understaffed in terms of security, however, that after 4 o'clock, hallways and chambers are left unprotected, and judges are fairly easy prey for any vengeful defendant. Judges are acutely aware of this problem and, like the general public, live in fear of criminal attack.

Having discussed the major liabilities and assets associated with the position of criminal court judge, this article will now focus on those specific strains and hardships which the judge experiences in attempting to carry out his professional responsibilities. The first problem area—sentencing—was agreed upon by all the judges as being the most difficult as well as the most frustrating aspect of their job.

I. Sentencing

Although the judges stated a variety of reasons, there was general agreement that sentencing was the most frustrating and perplexing part of their job. Many judges expressed discomfort with the responsibility placed upon them for making a decision so heavily laden with serious consequences. Nearly all of the judges were cognizant of the horrible conditions awaiting a defendant sentenced to serve time in a penal institution. The judges were aware that not only would the defendant lose his freedom for a long period of time, and be separated from his friends and family, but that there was a great likelihood that the defendant would be beaten, robbed, and possibly raped by his fellow inmates. Judges also knew that in nearly every case the defendant would eventually reemerge into society unchanged except for being more bitter and more inclined toward a life of crime.

Complicating the emotional strain under which judges must reach sentencing decisions is the increasing public outcry against the supposed leniency of their decisions. The mass media, concerned citizen groups, local politicians, and members of the law enforcement establishment such as police and prosecutors have united in their criticism of judicial sentencing. Police and prosecutors, in particular, have been quite vocal in their disparaging remarks. The judges realize that police and prosecutors may be motivated in part by a desire to shift the spotlight away from their own crimefighting inadequacies, but the public appears convinced that judges and their ineffective sentencing decisions are a primary reason for the breakdown in society's ability to control crime and keep local neighborhoods safe.

In addition to the great pressure and responsibility involved in sentencing, a lack of reliable background information on the defendant hampers the judge's efforts to reach an informed decision. A controversy is currently brewing in the New York County criminal courts, as judges and probation department officers blame one another for pre-sentence reports being both seriously delayed and fraught with errors and omissions. The judges have charged that the quality of pre-sentence reports has deteriorated to the point where

they are of very little use in sentencing decisions. The probation department has countered by stating that the judges have placed unreasonable time and workload pressures on its depleted staff, and are using the probation department as a scapegoat.

A final problem for judges attempting to conscientiously balance the needs of the defendant and society during the dispositional process is the absence of viable alternative forms of treatment for the defendant. The judge can either send the defendant to prison for a period of years or return him to the community by placing him on probation. The selection of prison seems to offer only a temporary solution since the defendant will eventually be released, angrier, and possibly more adroit in his criminal activities. Given the unrealistically large caseloads of probation officers, the defendant placed on probation receives almost no supervision or guidance, and is likely to be arrested for another crime. For the defendant with special psychological or physical problems, the chances of receiving viable help are also negligible. Halfway houses and other shelter alternatives in the community have not been established in sufficient numbers to provide a meaningful alternative except in a few isolated instances. Federal, state, and local budget reductions have also undermined these rehabilitative and reform efforts.

The present criticism of judicial sentencing has grown from the public's belief that the courts have been both too lenient and inconsistent. The result has been a perceived pattern of irrational and undesirable sentencing decisions in which both the defendants and the general public are being penalized. Defendants convicted of the same crime are seen to receive divergent sentences. The judges defend such variation on the basis of their obligation to individualize each sentencing decision, considering unique factors which relate to the specific needs of the defendant.

Within the past decade a majority of state legislatures have responded to this public clamor by increasing the severity of available sentences while reducing the discretionary power of the judge by creating determinant rather than indeterminant sentences. With determinant sentences, once a defendant is found guilty of a particular crime, the judge *must* sentence him to a narrow range of minimum and maximum years or months. Additional restraints may be placed on the judge's sentencing choices depending upon whether the defendant has prior felony convictions, whether these convictions involved violence, whether a gun was used in the current offense, whether the victim was a senior citizen, or whether heroin or some other danger-

ous drug was used or sold in large quantities. If any of these factors are present in the defendant's case, the judge is directed to alter his sentence as dictated by each of these special circumstances.

Most of the judges interviewed were not pleased with the shift from indeterminant to determinant sentences. Many judges were also upset by what they felt was an unnecessary stiffening of sentences, believing that the existing lengths had been sufficiently severe. The leniency issue, however, was not nearly as important to the judges as the lessening of their discretionary powers. Judges object to the reduction of their sentencing power because of its inhibiting effect upon their ability to reach what they believe to be a just disposition. Confident of his expertise, educated by his experience, the judge believes that he can only reach an intelligent sentencing disposition by being allowed to consider a wide range of mitigating factors concerning the defendant's background and any unusual aspects surrounding a particular crime. The opportunity to ponder a wide range of factors and utilize a variety of sentencing alternatives enables the judge effectively to fit the disposition to both the crime *and* the defendant. This particularistic style of sentencing was an outgrowth of penal reforms dating back to the 1920's,[2] and reflected a need to treat each defendant as an individual. Thus, the presence of disparities between individuals charged with the same crime was not a problem to be lamented, but rather a reflection of the judge's recognition of the unique circumstances in each case, and a testimony to the judge's perspicacity and care.

What are the factors a judge considers in the sentencing decision? Many judges try to inquire into the defendant's background in order to determine whether the present criminal activity has followed a discernible trend of antisocial behavior, or was an aberration in an otherwise law-abiding lifetime. Unfortunately, many defendants do not fall completely within either category. If they did exhibit such clear-cut patterns, judges would have a fairly easy time with the sentencing decision. Those defendants with consistent patterns of criminal behavior would be sent to jail and those who had committed an isolated act would receive probation. A given defendant, however, is more likely to have had an earlier criminal record but one which involved less serious crimes. Another may have had a conviction for a

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[2] *See generally* R. GOLDFARB & L. SINGER, AFTER CONVICTION 39 (1973); R. SINGER & W. STATSKY, RIGHTS OF THE IMPRISONED CASES, MATERIALS AND DIRECTIONS 5-7 (1974).

felony, but it could have occurred many years earlier, perhaps when he was a juvenile. During the intervening years, he may have had a clean slate.

Judges also consider a defendant's previous opportunities for rehabilitation. If, prior to his current offense, the defendant seemed to be making a sincere effort to put his life back in order, a second or third chance may be offered. On the other hand, when a defendant has failed to avail himself of opportunities which the court has offered in the past such as a drug program, vocational training, or psychiatric counseling, the court is more likely to give up on the defendant and sentence him to prison. The attitude and motivation of the defendant as manifested through his track record in these rehabilitative programs are of crucial significance to the judge. In fact, in cases where a sentence of imprisonment was possible but not statutorily mandated, these appeared to be the most persuasive factors in the judge's decision. Often a defendant is thought to have insulted the court by his refusal to take advantage of an earlier, generous opportunity for a second chance.

The judge is willing to read character references on behalf of the defendant as submitted by the defense attorney, but the facts of the pre-sentence report concerning the seriousness of the present offense, the defendant's past criminal record, and his willingness to participate in previous rehabilitative programs combine to provide the information most influential to the judge's sentencing decision. The prosecutor usually attempts to counter the defense attorney's plea for leniency with an equally unrealistic recommendation stressing the need to protect society from sociopaths such as the defendant. Most judges, particularly those sentencing large numbers of defendants after accepting a guilty plea, are unmoved by the posturing of both prosecution and defense, and generally adopt a reasonable compromise position.

As more and more jurisdictions grow upset over supposed judicial leniency and sentencing disparities, determinant sentencing statutes are being enacted, usually in combination with lengthier sentences. This means that not only are the judges given a narrower range of alternatives (i.e., a five to seven year term instead of a two to ten year term), but certain categories of crimes and defendants *must* receive specific sentences. Many states enacting such legislation have separated crimes into a number of classifications on the basis of severity. Any defendant who falls within a given category must receive a particular sentence depending upon the number and type of previous convictions. New York State terms defendants with previous felony

convictions "predicate felons."[3] If a weapon was used in these earlier crimes, they fall into the most serious grouping termed "violent predicate felons."[4] In addition to determinant sentencing statutes, states have attempted to utilize several other reforms. One of the most popular is "presumptive sentencing" provisions such as those found in New Jersey.[5] Under presumptive sentencing, the legislature recommends a particular sentence for a specific charge. If the judge chooses to go beyond the narrow limits of this recommendation, he must submit a written report justifying such action. Any sentencing deviation must be supported by information relating to relevant mitigating circumstances or unique personal situations.

The judges, clearly aware of the public sentiment against themselves and their brethren, have attempted for several decades to reform their sentencing practices. These efforts have resulted in both educative and institutional reforms which have been geared primarily toward resolving the disparity question. The educative reforms are typified by the development of sentencing seminars such as those offered at the popular National College of Judges in Reno, Nevada. These programs, usually one to two weeks in duration, attempt to show judges how differing personal perspectives can influence their sentencing decisions. Hypothetical case histories of defendants are distributed to the judges in attendance and each must impose his own sentence and then explain it to his colleagues. The judges quickly realize how their personal backgrounds and individual personalities influence their ability to impose particular sentences. The National College of Judges believes that if judges are educated as to the divergent opinions held by their colleagues, they will be more careful in the future to control personal prejudices affecting their professional behavior. Whether these seminars can have long-range effects upon a judge's sentencing proclivities has never been conclusively established. Critics of these programs believe they are little more than busman's holidays, with the many diversions of Reno serving to diminish the seminars' impact upon judicial behavior.

Other reforms such as sentencing councils and appellate review of sentences have also attempted to reduce unwarranted disparities by developing procedures whereby judges supervise each other's sentenc-

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[3] *See* N.Y. PENAL LAW § 70.06 (McKinney Cum. Supp. 1982-1983).

[4] *See* N.Y. PENAL LAW § 70.04 (McKinney Cum. Supp. 1982-1983).

[5] *See* N.J. STAT. ANN. § 2C:44-1(f) (West 1982) (criteria for withholding or imposing sentence of imprisonment).

ing, in some instances requiring written justifications from one another.[6] The sentencing council is a multijudge court, several members of which meet periodically to consider what sentences should be imposed in pending cases. Used primarily by federal district courts, this procedure shows participating judges their differing sentencing practices and offers a forum in which these differences can be debated and a consensus formed. The most bothersome aspect of the councils is the permitting of judges to meet prior to the sentencing hearing. This means that the sentencing judge, who has final responsibility for the sentencing, may have his objectivity impaired by the council's earlier discussions.

Although appellate review of sentences which fail to conform to statutory limits has long been authorized, nearly one-third of the states do not permit appellate review on the merits of a sentence. Nevertheless, a growing number of states have interpreted their general review statutes to grant such authority for appellate review. Usually this review is conducted by the regular appellate division, although a handful of states have created special courts staffed with experienced judges solely for the purpose of reviewing sentences.[7] Several judges interviewed were upset by appellate review and sentencing councils, viewing these reforms as an indication of the lack of faith of their colleagues in their ability to reach appropriate dispositions. Such review mechanisms were believed to be another example of trial court judges losing power as a result of public frustration over the rising crime rate. For some judges, this was especially upsetting because it was their fellow members of the bench who wilted under public pressure. These reforms were expected to heighten tensions between trial and appellate judges. Nevertheless, as such reforms are still in the embryonic stages and affect only a minority of jurisdictions, it is premature for both judges and critics to offer conclusions as to their long-range consequences.

The large majority of criminal court judges, perhaps because they realized the importance of their sentencing responsibilities, spent a great deal of time agonizing over these decisions. An equally weighty factor causing the judges to anguish over sentencing decisions was their increasing awareness of the horrible conditions presently existing in the various state penitentiaries. A prison sentence constitutes not only loss of freedom but most likely means subjecting the

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[6] TWENTIETH CENTURY FUND, FAIR AND CERTAIN PUNISHMENT 19 (1976).

[7] PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 26 (1967).

defendant to various forms of violence rampant within prison walls. A final influence upon the judge is the serious overcrowding in nearly all state prisons. Sentenced defendants commonly must wait months in county detention centers before there is a vacancy in a state facility. All of these factors combine to convince a judge that only the most heinous criminals deserve to be sent to prison. As judges are aware that only the toughest criminal will be able to survive in these institutions, many defendants who might previously have been sentenced to prison are receiving probation. It was also interesting to note that several judges made it their practice to follow-up on defendants after sentencing and recognized a responsibiity for informing defendants as to the perils of incarceration and guiding them toward a possible return to respectability.

II. Outside Pressure

Various external pressures affect judicial behavior and the overall performance of the local criminal justice system. These include the media, local politicians, community groups, and the appellate courts in addition to several broader sociocultural variables. Given the specific theme of this article, I will briefly examine the effects of criticism from several of these groups, and discuss why this verbal abuse constitutes one of the most unpleasant aspects of the job of a criminal court judge.

Judges feel that independence from these outside groups is critical to preserving the climate necessary for them to perform their job with optimal objectivity and effectiveness. Although judges rarely offer public reactions when this independence is compromised by the intrusion of these external influences, they seethe internally and grow increasingly aloof from the public they are sworn to serve. Nevertheless, during the years I spent observing and interviewing judges, they usually reserved their most acerbic private comments for those media and local political figures who had maligned their professional efforts.

Most judges are successful in their efforts to avoid the media's spotlight. They are careful to abstain from pretrial decisions, plea bargains, or sentences which can be expected to upset and possibly outrage the public. Judges acknowledge that the media, in the words of one Philadelphia judge, "can really do a number on you if they want to."[8] This awareness has a chilling effect on judicial behavior: As

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[8] Interview with Philadelphia criminal court judge (Summer 1980).

judges are well aware, pro-prosecution decisions will rarely raise the public concern or media attention aroused by decisions which appear lenient.

Approximately one-third of the judges interviewed, however, did not seem to be intimidated by the possible repercussions from public exposure of their courtroom actions. These judges, who were typically less prosecution-oriented than their more reticent brethren, appeared to almost relish the media's attention and delight in flashing their judicial opinions dramatically before the public. Their more reserved colleagues are often the harshest critics of these outspoken judges. Mutterings of grandstanding, overly active egos, and political careerism are typically directed towards those judges basking in the public eye.

Today, a growing number of judges do seem willing to move into the limelight and abandon the protected isolation of the courtroom. They justify their newfound courage and loquacity on the basis of an urgent need to correct the public belief that the criminal courts are a major cause of urban crime problems. Unwilling to remain scapegoats for the failings of society in general and the criminal justice system in particular, these judges feel it important to educate the local public as to the realities and complexities of crime and of their city's method of dealing with it. One judge went so far as to urge his colleagues to bring citizens from the community, especially high school students, into their courtrooms in order to show them how the system actually operates. He had been performing such quasi-educational courtroom sessions himself for many years, and felt it was probably his most worthwhile achievement.[9]

III. Administrative Tedium

Almost all of the judges interviewed stated that one of the most annoying aspects of their job was the administrative tedium. They complained not only of the ever-increasing demands for paperwork from their superiors, but of the frustrating lack of cooperation from other public agencies upon whom they depend for critical information. One retired judge commented that he was so busy with administrative details that he had no time to think. He felt that he was becoming more of a clerk and less of a judge.[10] The bureaucratic spirit

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[9] Observations and interviews in Philadelphia, Pa. (Summer 1980).

[10] Interview with retired District of Columbia criminal court judge (July 1980).

of the state and federal government has clearly permeated the local criminal courts. Judges in several cities reported being required to keep a time sheet in which they had to record how they spent each hour of the working day, including the length of their lunches.

Some degree of administrative frustration is the expected by-product of an overworked and understaffed court system in which many diverse parties and agencies, including those in aggressive competition with one another, must be convinced or cajoled into cooperating. The often chaotic scenes observed in the nation's courthouses illustrate the wide range of individuals who must be coordinated before a judge can begin to process a case. This complex process begins as early as the preliminary hearing and is repeated at every subsequent appearance. The public defender or defense counsel must be present with his client and in possession of the proper case file. The prosecutor must also be prepared with the defendant's prior record and a copy of the police department's arrest report, as well as statements from witnesses and any other relevant information. If the defendant had failed to make bail and was detained in the local jail, the sheriff's department must have him in the courtroom. The judge may also wish to see any preliminary reports from the probation department relevant to the defendant's background. The arresting police officer is often required to be present and to bring any necessary evidentiary material. The situation is further complicated where additional state or federal law enforcement agencies (e.g., FBI, State Police, Military Police, Drug Enforcement Agency, Immigration Bureau) possess important information relevant to the case. The judge, finally, must also turn to his clerk to make sure he has before him the proper case folder, which lists all previous court action taken with regard to the case.

The odds are highly in favor of one or more of the previously mentioned individuals or documents not being in the proper place at the proper time. Additionally, when one realizes that the average case involves six court appearances, it becomes easier to understand that each case represents an ongoing bureaucratic nightmare for the criminal court judge. On the basis of the author's many years of courtroom observation, especially at pretrial proceedings where a large number of cases must be processed, it seems fair to estimate that every other case, and frequently two cases out of three, come before the judge lacking some critical individual or document. This necessitates a postponement until a future date when everyone can try again. At this subsequent proceeding, the odds improve only slightly that all required elements will be present, enabling the case to be processed.

Judges do appear to be able to exercise a limited degree of influence in reducing the number of postponements. This may be accom-

plished either by gaining a reputation as a no-nonsense judge who will consistently penalize tardiness, or by unmercifully driving one's self and one's staff in a never-ending struggle to control the docket and to ensure the prompt appearance of all parties. Judges who adopt either of these styles, and especially the latter, run a strong risk of antagonizing their personal staff as well as the courtroom workgroup. These tensions can cause the other actors to become uncooperative or recalcitrant, and eventually be counterproductive to the judge's laudatory goals. Thus, the judge who becomes abrasive in striving for courtroom efficiency may be less successful in his search than a more complacent judge who slogs through his pile of cases in a relaxed and friendly manner.

The court administrator is the public official whose position was created in order to assist the judge in tackling these burdensome tasks. The powers of this administrative judge and those of his administrative assistants varies signficantly from city to city, but generally one expects this official to be held accountable for controlling the behavior of his management specialists. It is ironic that despite the fact that these administrative officials were developed for the purpose of aiding the judges with their managerial responsibilities, they have, at least in the eyes of most judges, made the judge's professional lives more miserable by appreciably increasing the amount of tedious paperwork which must be completed.

The administrative judges and their staff are likely targets for frustrated judges drowning in files, records, and miscellaneous documents. Also, because the court administrators are technically responsible for the working conditions, including the deteriorating physical plant and vanishing professional amenities, they are blamed for all of the problems that upset the judges. As the minor irritations continue to mount and to multiply in both frequency and severity, the hostility of the criminal court judge also begins to escalate. When the air conditioning system malfunctions during the same day that the copy machine breaks down and a law clerk is mugged in the bathroom, the judge is likely to point to the Office of Court Administrator as the primary cause of all his woes.

Several administrative judges are able to survive in this nerve-racking environment by utilizing a "stick and carrot" method of dealing with the judges. The administrative judge has power to control, among other things, which chambers a judge may be assigned, which courtroom he will have, and who his bailiffs will be. These are all critical factors affecting the quality of the judge's professional existence. It may, therefore, behoove the judge to cooperate with his presiding or administrative judge as much as possible, for the alterna-

tive may lead to a very unpleasant tenure on the bench. Since all judges in a particular jurisdiction receive nearly the same salary, their only way of indicating their relative superiority is in their possession of better offices or more stylish courtrooms. The administrators hold the keys to both status and comfort in the criminal courthouse!

It must be noted that the judges themselves are not entirely blameless for this administrative chaos. Their prior experience as attorneys, assisted by a handful of loyal clerks and secretaries, has not prepared them for the massive and detailed administrative responsibilities presently facing them. Scheduling cases, dealing with various public bureaucracies, shuffling an endless flow of records and documents are all tasks which most judges have never had to confront. An insensitive public, inadequate staff, and budget-cutting legislators only exacerbate this already serious dilemma. The fragmented efforts to deal with these administrative problems through increased use of computers as well as additional training for the staff do not seem adequate as a response to so deep-rooted a problem.

IV. Maintaining Order in the Courtroom

Nearly all judges are concerned with disorder in their courtrooms. They fear outbursts from attorneys, defendants, and courtroom spectators. Nevertheless, actual incidents observed during my twelve years of investigations as well as those recounted by the nearly one hundred judges interviewed revealed the extreme rarity of such occurrences. In the definitive study of courtroom disorder conducted by Norman Dorsen and associates under the auspices of the Bar Association of the City of New York, 107 judges, responding to a questionnaire sent to 4600 trial judges throughout the United States, reported a total of 112 cases of disorder in their courtrooms.[11] The results of the study, known as the Dorsen Report, indicate that these incidents occurred most frequently during serious felony cases, although there were instances of disorder in a surprising number of divorce proceedings (eight). Seventy-four of the cases involved criminal defendants (thirteen of whom were later found to be mentally disturbed) while seventeen were spectators and eight were attorneys. The court dealt with these disturbances by issuing contempt citations (thirty-two), warnings (twenty-four), binding and gagging of defendants (seventeen), removal from the courtroom (thirteen), declaring a mistrial (one), and clearing the courtroom (one).[12]

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[11] N. Dorsen & L. Friedman, Disorder in the Court 6 (1973).

[12] *Id.* at 275.

Despite the serious nature of most of these courtroom incidents, the empirical evidence from the Dorsen Report clearly indicated their rarity. Only two percent of the large national sample of trial judges questioned were able to report even a single incident taking place in their courtroom.[13] Nevertheless, because the number of incidents does seem to be on the rise, and even more importantly, because the judges and members of the local bar associations are so concerned with the problem, it has assumed a prominence justifying a brief discussion within this article.

The types of behavior problems facing a judge and his level of concern about such problems depend a great deal upon whether it is the defendant or one of the opposing attorneys causing the problem. Defendants have been found to commit the following categories of misbehavior: passive disrespect, isolated emotional outbursts, noncooperation and repeated interruptions. Presented in ascending order of severity, the list is also in descending order of frequency. The overwhelming number of incidents which I observed involved passive disrespect. It appears that at least ninety percent of the total number of incidents fall into either this category or that of "single outbursts."

The frequency of the disrespect was so high in several courtrooms that it appeared the judges were barely cognizant of the contemptuous attitude of the defendants. Although common sense would seem to dictate that one dress and behave in a manner least likely to antagonize the judge, in situations such as arraignments and sentencing hearings, defendants often do not do so. Despite the seriousness of these proceedings in which the defendant's freedom is at stake, defendant after defendant (especially those between the ages of eighteen and twenty-four) was unwilling to alter his insulting manner and appearance. This obvious lack of respect toward the judge and the court was manifested through slouching postures, grunting responses, and sullen stares.

Early research in Detroit's Records Court clearly supports the premise that judges penalize defendants who appear disrespectful in their courtroom (and conversely reward those defendants who try to placate the judge by exhibiting remorse and respect).[14] Thus, it is truly puzzling that defendants persist in their masochistic ritual. One can

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[13] *Id.* at 6.

[14] Jaros & Mendelsohn, *The Judicial Role and Sentencing Behavior*, 11 MIDWEST J. POL. SCI. 471, 484-86 (1967).

only imagine that there is a strong belief in the necessity for maintaining a "macho image" in front of friends and spectators in the courtroom. Deference to the court may be equated with weakness, and no sign of weakness is to be shown, even if one's lack of deference is certain to cause serious personal hardship. Some defendants may also believe, along with the general public, in the leniency of the courts, and in a revolving door system of justice in which the courts are unwilling to treat cases seriously. These defendants fail to realize that as they become older and their crimes grow more serious, the court's patience will run out, and lengthy prison terms will replace the expected probationary sentences received in the past. Their previous guilty pleas may have lulled them into believing the myth that the court is impotent—a myth which will explode before them as they realize too late that they have finally gone too far.

The other forms of defendant misconduct—isolated outbursts, noncooperation, and repeated interruptions—all occur during that procedural rarity, the trial. The defendant, a virtual nonparticipant for most of this proceeding, may be driven to these emotional outbursts out of frustration with the slow-paced and at times incomprehensible legal maneuvering. Many defendants also sense the higher stakes involved in a trial, usually reserved for the most serious cases. By refusing to plead guilty, the defendant understands that he is risking a lengthy sentence if convicted. Pretrial court appearances are frequently of so short a duration and of such narrow scope that the defendant lacks both the time and purpose for misbehavior.

When a defendant does misbehave, the judge has a wide range of available sanctions. These extend from the more commonly utilized preventive strategies such as issuing a warning or negotiating a solution to the more repressive tactics of holding the defendant in contempt, removing him from the courtroom, or binding and gagging. Most defendants who receive these rarely dispensed sanctions are either mentally ill or suffering from emotional distress. During twelve years of observation, I witnessed only one incident in which a defendant was removed from the courtroom.

Attorneys may also be disciplined by the judge for misbehavior. These infractions include making disrespectful remarks, refusing to obey proper court procedures, using purposefully obstructionist or dilatory tactics, and repetitive or excessive argumentation. These forms of misbehavior, especially the use of the questionable delay tactics or overly aggressive cross-examination of witnesses, may take on either blatant or subtle manifestations. When a judge believes that a lawyer has intentionally and repeatedly engaged in these forms of

misbehavior, he may sanction the attorney through any of the following methods: civil or criminal contempt citations, discipline by the local bar association, suspension of the right to practice, or removal of out-of-state lawyers' permission to practice. Formal sanctions are extremely rare. Of the more than one hundred judges who responded to the Dorsen questionnaire, only one reported sanctioning an attorney: a criminal contempt citation jailing the lawyer overnight.

In conclusion, although there seems to be a slight trend toward increasing disrespect for the judiciary, the number of actual incidents remains miniscule. Judges interviewed disdained use of sanctions except in the most serious cases. They believed that any judge who was willing to use his contempt power with any degree of frequency was indicating a critical weakness in both his judicial temperament and his ability to control his courtroom.

V. Judicial Misconduct

Judges themselves are not immune from occasional transgressions. Even though instances of judicial misbehavior are rare, they are still an issue of great public concern. As was seen in the forms of attorney and defendant misbehavior, judicial misconduct can range along a broad continuum from the relatively minor to the very serious. Also, as was discovered with regard to attorneys and defendants, the preponderance of incidents cluster at the less serious end of the spectrum. Examples of these less serious types of judicial misconduct are acts of rudeness or bias and forms of undignified behavior. These acts commonly occur when judges are being overly aggressive in their questioning of witnesses or commenting too frequently on evidence. Both of these types of judicial behavior may give the impression of partisanship to the jury and spectators. This problem can also be seen in the perceived abuse of attorneys, which implies an unprofessional preference for or hostility toward one of the adversaries. This last topic, although it may only be categorized as a "less serious" form of judicial misconduct, is the most common type, and can have a significant impact upon the ultimate outcome of the trial.

Given the chaotic conditions found in the courtroom and the various pressures exerted upon criminal judges, it is not surprising that they may not be able to continually maintain a calm and dispassionate temperament. The frustrations of needless delays, incomplete records, insolent defendants, and incompetent attorneys all contribute to a debilitating and enervating judicial experience. Occasionally, one does find a judge who lacks the character traits essential to dispensing the judicial function, and whose anger quickly rises to the surface. Frustration may cause the judge to become rude or abusive toward

attorneys, defendants, or anyone else in close proximity when his temper reaches the boiling point.

The more serious categories of judicial misconduct are the result of either the incompetence or venality of the judge. Although these transgressions are extremely rare, they are always important media events. In this post-Watergate period of heightened citizen scrutiny of public officials and their moral behavior, the media devotes a great deal of attention to any breach of the public faith, especially by a judge. One student of the subject, Charles Ashman, believed the problem to be so widespread that he wrote a book on the subject entitled *The Finest Judges Money Can Buy*, and has toured the nation expounding on the topic of judicial corruption.[15]

Ashman has collected the case studies of nearly two hundred corrupt judges. His book contains chapters on the relationship between organized crime and the judiciary, judicial avarice, moral decadence, "court jesters," and political manipulators and grafters. His compilation offers a frightening portrait, but one must realize that he is covering *all* federal and state judges for a *forty year* period.

Without minimizing the problem, nearly all research in this area has found judicial malfeasance to be a very rare occurrence. Certainly judges lose their tempers, raise their voices, and permit their emotions to be observed by everyone in the courtroom on a daily basis. This, however, seems to be much more a product of courtroom pressures than of an abundance of unsuited, ill-tempered judges who should be relieved of their duties. In addition to devising a much needed system for spotting and removing those judges who cannot stand the strains and tensions of the criminal courtroom, it seems to make even greater sense to focus reforming energies upon the sources of courtroom confusion and implement policies geared toward its reduction.

When a judge does begin to exhibit a pattern of behavior which threatens his legitimacy as a neutral arbiter and compassionate dispenser of justice, it is critical that action be taken. Even if instances of such misconduct are rare, they serve to undermine the credibility and efficacy of the entire judicial structure. The public demands its judges to be not only fair but also to give the appearance of fairness. Anything less will seriously weaken the public's confidence in the criminal courts.

Why should judges, given their lofty position, even be tempted to commit an act of malfeasance? Many judges, especially those who have served on the bench for a long period of time, may become so

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[15] C. ASHMAN, THE FINEST JUDGES MONEY CAN BUY (1973).

frustrated seeing guilty defendants pass through their courtrooms that they believe themselves justified in bending the law so as to bring about what they perceive to be a more socially desirable end. After sitting on the bench some judges may begin to think they *are* the law and believe that they must actively pursue those ends which they *know* to be right, despite the fact that this may cause them to utilize questionable and at times unlawful means. They are encouraged in this pursuit because of their knowledge that most of what they do is unreviewable by appellate courts, and that other sanctions are almost never used.

What types of sanctions are available to discipline a judge? The oldest and most cumbersome is impeachment, which is occasionally threatened but almost never used. Appellate review and investigation by local bar associations have been tried in several jurisdictions, but in the past decade the most popular method has been investigations conducted by commissions or boards of inquiry. These institutions seem to be modeled after either the California or New York systems. In New York, the State Commission on Judicial Conduct has no investigative arm, no screening mechanism, and appears to be dominated by the state legislature and governor. Their most recent action (March 1, 1983), censuring a judge for addressing a female lawyer derisively as a "little girl," has not helped the credibility of the Commission. The *New York Times* reported that "Six of the nine members of the Commission made up of judges, lawyers, and private citizens, felt that [the justice] should be publicly admonished. Two thought he had behaved improperly, but voted to admonish him privately. One said the Justice has done nothing wrong, that the lawyer was too sensitive, and the Commission was overreacting."[16]

The California Commission on Judicial Qualifications is composed of five judges appointed by the state supreme court, two lawyers appointed by the state bar association, and two laymen appointed by the governor. The Commission has a permanent staff and in addition uses outside investigators. It can act on its own initiative in a wide range of cases. The Commission has been fairly successful in resolving disciplinary matters quietly and informally. Professor Albert Alschuler, in his study of courtroom misconduct, discovered that the Commission receives approximately one hundred complaints each year, most of them from angry litigants.[17] Two-thirds of the complaints

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[16] Shipp, *Judge Censured for Addressing Lawyer as 'Girl,'* N.Y. Times, Mar. 1, 1983, at B1, col. 1.

[17] Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 703 (1972).

were settled by the staff. Only three cases were referred to the state supreme court, and fifty judges resigned while their cases were under investigation. Alschuler concluded that:

> [t]he California experience has demonstrated that a commission system can be effective in disciplining judges for abusive courtroom behavior. Nevertheless, one may have an uneasy feeling about a regime that emphasizes confidentiality, that accomplishes its results primarily through backroom settlements, and that is dominated by members of the elite professional group that it is designed to control.[18]

One additional jurisdiction which I visited, Washington, D.C., appeared to be operating a viable disciplinary institution. The city utilizes a Commission on Judicial Disabilities and Tenure formulated and operated in a manner similar to the California system, but with broader powers. In addition to dealing with discipline and involuntary retirements, the Commission is responsible for approving reappointments. In 1976 and 1977 they handled thirty-two complaints regarding conduct and eventually conducted one disciplinary proceeding. Their main task seemed to be supervising reappointment proceedings for four members of the city's superior court whose terms were ending.[19]

Even the seemingly effective commissions in California and the District of Columbia seemed to have a minimal impact upon curbing the problem of judicial misconduct. Judges, like most professional groups, do not wish to "hang their dirty linen out in public." They would much prefer to deal with their erring colleagues through informal pressure. No one wants to be the first to point an accusing finger, since all judges realize that they too could soon be on the wrong end of a commission inquiry. In addition to these rather expected complications, the cumbersome bureaucracy of the courts also emerges as a serious obstacle to expeditious decisionmaking.

In concluding this section on judicial misconduct, it must be remembered that the number of venal or corrupt judges in our judicial system appears very small. There are many judges who lack the proper judicial temperament, abuse attorneys, or act prejudicially in favor of one of the parties, but thankfully, the actual number who intentionally commit acts of malfeasance while on the bench remains extremely small. The other problems of abusive and ill-tempered

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[18] *Id.* at 707-08.

[19] D.C. COMM'N ON JUDICIAL DISABILITIES & TENURE ANN. REP. (Oct. 1976–Sept. 1977).

judges are not to be ignored and must be addressed if we are to restore the public faith in our urban justice system. I believe, however, that this can best be accomplished by improving the judge's working conditions and allowing for criminal court decisions to be made in a safe and sane atmosphere, free from the turbulence and confusion which presently exists.

CONCLUSION

This article has attempted to portray the professional behavior of the judge as he attempts to wrestle with the daily demands of his position. It is hoped that by better understanding the complex problems which the felony court judge must face, as well as appreciating the inhospitable environment in which his difficult task must be performed, the public will be in a better position to take intelligent and compassionate steps towards improving the fairness and effectiveness of the urban justice system.