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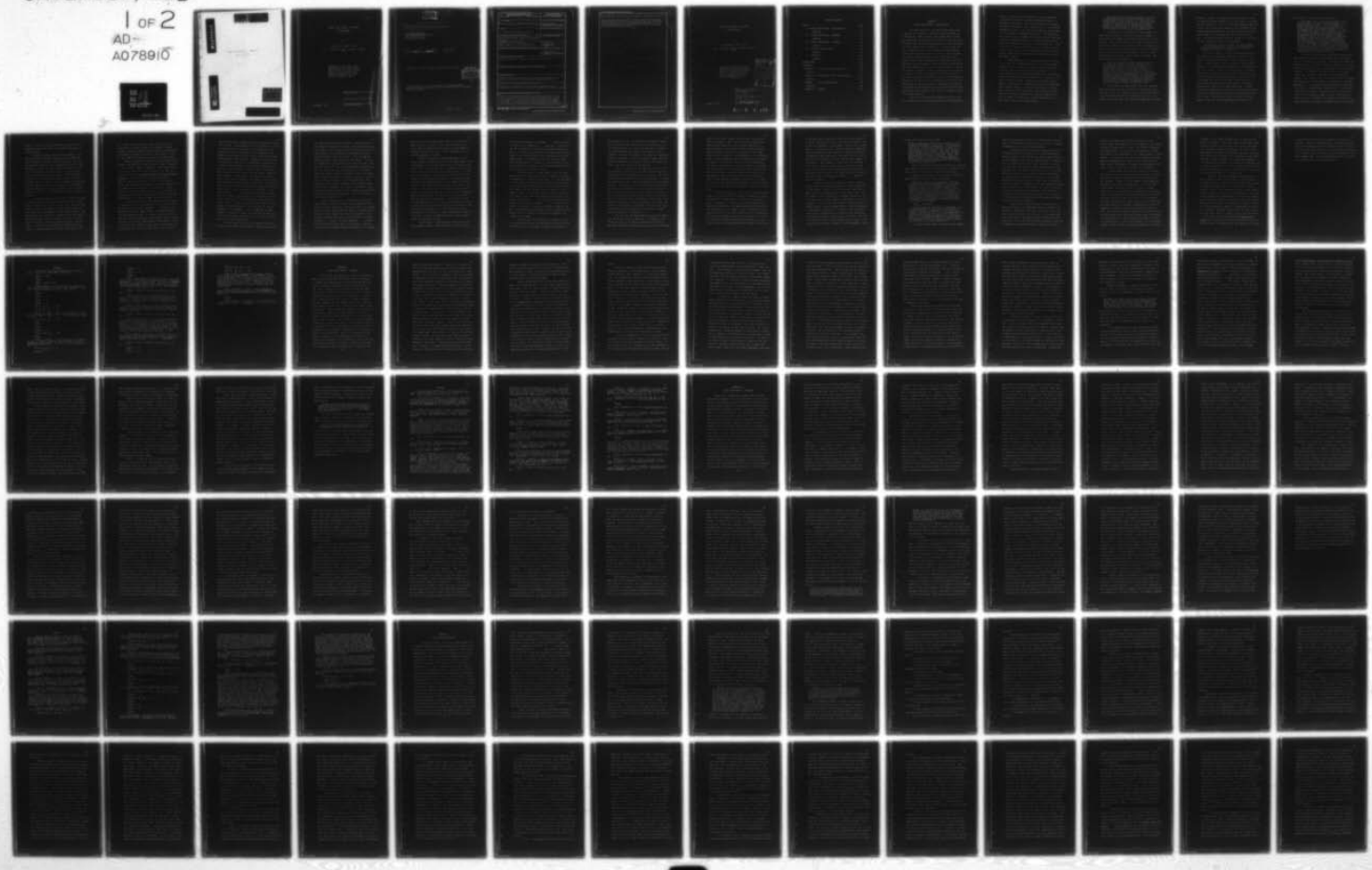

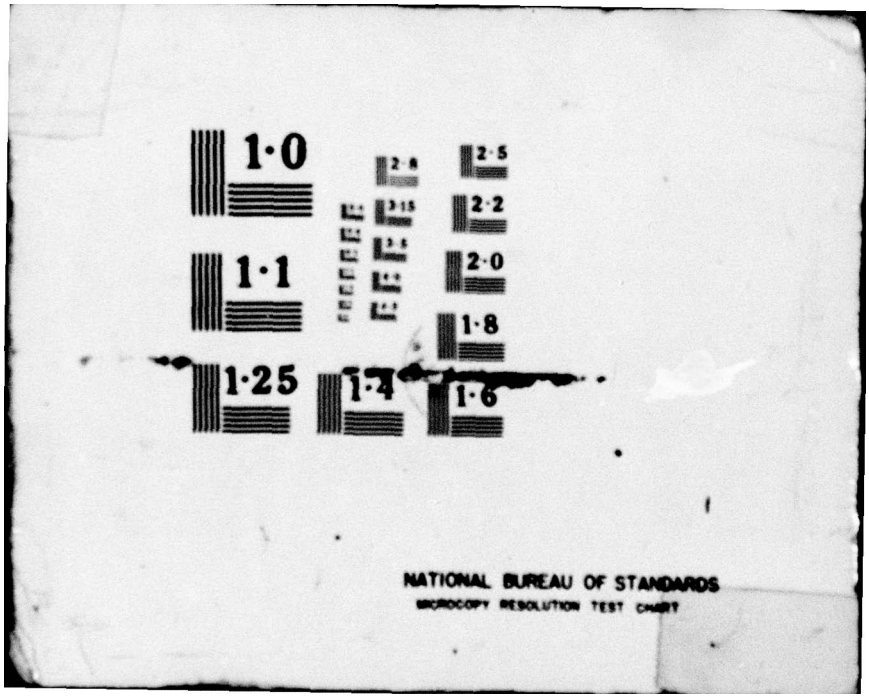
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STATE COURT REFORM: PROGRESS AND PROBLEMS

by

Lionel Hector, MAJ., U.S.A.

B.A., Columbus College, Columbus, Georgia
1975

Respectfully submitted to the
Department of Political Science
and the Faculty of the Graduate
School of the University of
Kansas in partial fulfillment
of the requirements for the
degree of Master of Arts.

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Major Advisor

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For the Department

December, 1979

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200 Stovall Street
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This work discusses the status of state court reform in the United States ostensibly as of 1978. (Some data are only as current as 1976.) It divides court reform into three areas for study; (1) organizational restructuring of the courts themselves; (2) organizational restructuring and consolidation of the management and administrative functions; and; (3) the

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consolidation of the fiscal functions of the state courts.

The study concludes that state court reform has been extraordinary since 1940 but that indications are that the momentum is waning and that those responsible for such reform must become aware of this phenomenon and attempt to counter it through long range planning.

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CHAPTER I

STATE COURT REFORM: THE BEGINNING

The annual meeting of the American Bar Association in 1906 was not expected to establish legal precedents nor to address any issues of major legal significance. These yearly meetings, as much social as official in nature,[1] gave the members and their wives an opportunity to get acquainted with other members and, incidentally, to discuss legal matters of common interest. The schedule for these meetings included daytime conferences on a variety of legal subjects and evening addresses usually open to the wives as well. Normally those chosen to address the assemblage in the evenings were selected because of their national prominence and their acknowledged ability to edify their audience.[2] But on the evening of August 12, 1906, an exception to the norm was to be made. For the first speaker of the evening was not well known nationally, and his sole claim to the podium that evening was the fact that, at a meeting of his own state bar association, he had so particularly impressed the President of the American Bar Association with his oratory that he had subsequently been invited by that officer to address the ABA at its annual meeting.[3]

His lack of real national prominence did not, however, disqualify this particular speaker from possessing the

ability to provide for the edification of the assemblage. A particularly well and diversely educated individual, he possessed a doctorate in the field of botany, had attended the Harvard Law School, was a former justice of the Nebraska Supreme Court and, at the time of this meeting, was the Dean of the University of Nebraska Law School.[4] One might imagine then that as the speaker was being introduced there were a variety of emotions present in the audience ranging from pride and pleasure on the part of those who knew him to hope, on the part of those that did not, that his speech would be, at most, short and, at least, interesting. None could have possibly known at that point the significance of what they were about to hear.

"Dissatisfaction with the administration of justice is as old as law,"[5] began Roscoe Pound on that warm summer evening in 1906. "Not to go outside our own legal system, discontent has an ancient and unbroken pedigree."[6] One might imagine that this opening offended no-one and promised a speech of deep philosophical perspective so typical of the time, place and occasion. Certainly the opening statement tended to imply that the "causes" which were to be addressed were probably inherent to those who were dissatisfied more than a function of the system about which there was dissatisfaction. Further, nothing in the opening comments could have led anyone to believe that this was developing into a criticism of anyone or anything present.

> With the scope of inquiry so limited, the causes of dissatisfaction with the administration may be grouped under four main heads: (1) Causes for dissatisfaction with any legal system, (2) causes lying in the peculiarities of our Anglo-American legal system, (3) causes lying in our American judicial organization and procedure, and (4) causes lying in the environment of our judicial administration.[7]

At this point in the speech one might imagine that those who were paying close attention may have begun to realize that this speech was becoming something of a reform advocacy. Had not the speaker just casually implied that there were "problems" in the American judicial organization? Still, Pound had not pointed a finger at anything or anyone and any implications he may have made to this point were hardly definitive enough to have caused any offense. But Roscoe Pound was just warming up.

> Under the second main head, causes lying in our peculiar legal system, I should enumerate five: (1) The individualist spirit of our common law, which agrees ill with a collectivist age; (2) the common law doctrine of contentious procedure, which turns litigation into a game; (3) political jealousy, due to the strain put upon our legal system by the doctrine of supremacy of law; (4) the lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which gives us petty tinkering where comprehensive reform is needed, and (5) defects of form due to circumstance that the bulk of our legal system is still case law.[8]

At this point one must suspect that only those who had fallen asleep failed to realize that Roscoe Pound was treading on thin ice. Nobody could have much cared whether or not there was compatibility between the spirit of the common law and the "age," but calling the American courtroom

procedure a "game" or alleging "political jealousy" within the judicial system was hardly a pat on the back to the American Bar Association. Still, the concepts addressed were not totally new nor previously unheard by this congregation and, though perhaps discomforting, they were probably not sufficient enough to have prompted any real reaction to this point. But Roscoe Pound was about to attract all the attention and reaction any man could have wanted:

> Our system of courts is archaic in three respects: (1) in its multiplicity of courts, (2) in preserving concurrent jurisdictions, and (3) in the waste of judicial power which it involves.[9]

One has to wonder if Roscoe Pound appreciated the full impact of his statements, especially in view of the audience to which they were made. While there was, even then, a reform movement within the American legal system[10] and most of the ideas advanced by Pound in this speech were not truly original, certainly he was the first to present them to such an auspicious and influential group and to do so without qualification or reservation. That his "attack" on the American judicial system and, barely indirectly, on the American Bar Association would result in an adverse reaction must certainly have been predictable. Further, that such statements might well have constituted professional suicide for Pound must have made them that much more difficult to make. Nevertheless, there is nothing in Pound's speech to indicate that he experienced any hesitancy in

delivering his opinion exactly as he held it.

> The causes that lie here must be heeded. Our administration of justice is not decadent. It is simply behind the times. Political judges were known in England down to the last century. . . . Dodson and Foggs and Sergeant Buzzfuzz wrought in an atmosphere of contentious procedure. . . . We are simply stationary in that period of legal history. With law schools that are rivaling the achievements of Bologna and Bourges to promote scientific study of the law; with active Bar Associations in every state to revive professional feeling and throw off the yoke of commercialism; with the passing of the doctrine that politics, too, is a mere game to be played for its own sake, we may look forward confidently to deliverance from the sporting theory of justice; we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.[11]

As Pound left the podium, there must certainly have been courteous applause for his presentation. But there were no accolades--no enthusiasm. His words had shocked the group[12] and only one person, Everett P. Wheeler, a New York lawyer and reform activist, even admitted to favoring Pound's viewpoint. Mr. Wheeler stood and, before the presiding officer had a chance to introduce the second and final speaker of the evening, moved that Pound's speech be printed and reproduced in 4,000 copies for distribution to the ABA membership.[13] A discussion ensued during which another New York attorney, James Andrews, advanced that, "A more drastic attack upon the system of procedure could scarcely be devised."[14] Mr. Andrews's comment is said to have been the principal block to passage of Mr. Wheeler's motion[15] but it seems reasonable to assume that Andrews was only echoing the

opinion. In short, Roscoe Pound's debut in front of the American Bar Association was, at the time, anything but a rousing success.

A lesser man might well have been crushed by such obvious rejection and might subsequently have chosen the less controversial career of botanical science. And a lesser profession might well have relegated the author of such ostensibly offensive opinions to virtual obscurity at best, and to professional ridicule at worst. But both Roscoe Pound and the American Bar Association in 1906 were made of stronger stuff. Pound was the first to benefit from his outspoken position. Shortly after the momentous ABA meeting, Pound was asked--actually for the second time by Professor John Henry Wigmore--to become a professor of law at Northwestern University and he subsequently accepted the position in 1907.[16]

The American Bar Association was a little bit slower in recognizing the veracity and accuracy of Pound's statements. Nevertheless, by 1908, the ABA had at least endorsed Pound's concept of the need for a more simplified and unified court system--an admission, without great fanfare, that Pound's specific criticism of the American judicial system had hit the mark. Overall acceptance, however, of Pound's position throughout the legal profession did not come overnight. In fact, while the beginning of American judicial reform is frequently marked from Pound's 1906 speech, the

fact is that it was some thirty years later before the accolades really started coming. For example, although Professor John Henry Wigmore offered Pound the professorship at Northwestern immediately after the 1906 speech, it was not until 1936 that Wigmore was to say that Pound's speech ". . . struck the spark that kindled the white flame of high endeavor, now spreading through the entire legal profession. . . ."[17] In 1940, Arthur T. Vanderbilt, then Chief Justice of the State of New Jersey and President of the ABA, published a book entitled Minimum Standards of Judicial Administration in which he said that Pound's 1906 speech ". . . should be required reading once a year for every judge, lawyer, law professor and student on the day he returns from his summer vacation and faces his work anew."[18] Roscoe Pound had, some thirty years after his little heralded appearance before the ABA, become a national hero to the legal community and the "father" of American legal reform.[19]

Roscoe Pound told his 1906 audience that the causes of dissatisfaction with the administration of justice could be divided into four main categories: (1) Causes for dissatisfaction with any legal system, (2) causes peculiar to the Anglo-American system, (3) causes resulting from the American judicial organization and procedure, and (4) causes created by the judicial administration environment.[20] Within the first main category, Pound said that there were four subcategories which could be identified. First, he said,

people are generally dissatisfied with the mechanical operation of rules. Acknowledging that this mechanicality is one of the penalties of uniformity, Pound proposed that its aggravation could be minimized but not eliminated. For example, Pound pointed out that rules or laws can be either quite general or very explicit. General laws are very easily applied but tend to give the magistrate a great deal of latitude, thus decreasing the likelihood of uniformity of application or enforcement. Explicit laws, on the other hand, said Pound, tend to make the legal system "cumbersome and unworkable." More exactly, the creation of rules or laws to cover every foreseeable contingency results in more laws than there are magistrates to apply them. According to Pound, the only solution to reducing this source of dissatisfaction was to find a happy medium or compromise. Pound maintained that, ". . . the law has always ended in compromise, in a middle course between wide discretion and overminute legislation."[21] This compromise, said Pound, frequently leads to a legal rigidity which can create conflicts between the legal standards of the courts and the ethical standards of the community. It is a compromise of these standards, according to Pound, which provides the best justice and which reduces the effects of this cause of dissatisfaction with any legal system.

The difference in the rate of progress between law and public opinion was another cause of dissatisfaction with

any legal system, according to Pound. Closely related to the mechanical operation of the law, Pound pointed out that the system can never change as rapidly as public opinion because change to the system must be dependent upon public opinion becoming "fixed and settled." "The law does not respond quickly to new conditions," said Pound. "It does not change until ill effects are felt; often not until they are felt acutely."[22] And, like the mechanical operation of the law, this problem can be reduced but not eliminated. Unlike the former, however, the degree to which this phenomenon causes dissatisfaction is more a function of society than of just the judiciary. Pound explained that, even though the judiciary must be aware of and attempt to apply current social standards, "in an age of rapid moral, intellectual and economic changes, often crossing one another and producing numerous minor resultants, this friction cannot fail to be in excess."[23]

Still another source of dissatisfaction with any legal system, according to Pound, was the assumption that justice is easily defined or, more specifically, that anyone having access to the law should be capable of making a just decision. Pound compared the judicial profession to the building profession and laws to the equivalent of building blueprints. "A layman is no more competent . . . to apply the one formula than the other," stated Pound. "Each requires special knowledge and special preparation."[24] Ignor-

ance of this fact, alleged Pound, leads to the inefficient administration of justice to the dissatisfaction of all. It is clear that Pound was advocating the establishment of prerequisites for jurists but, in this appearance, he carried this argument no further.

Finally, said Pound, popular impatience with restraint causes a dissatisfaction with any legal system. One is reminded of the old lynch mobs as proof of Pound's allegation. Men, claimed Pound, have a tendency to believe that they are above the law because they participate in its creation. This tendency, he continued, lends further to a disrespect for the laws and, subsequently, resistance to them. Of course, the underlying cause of this impatience with restraint is the conception that the law is not equally fair to all. It is in fact the very compromise which Pound extolled that causes one man, who, in the course of compromise must give something up, to believe that the law has dealt with him less fairly than another. Pound did not say but it seems appropriate to note, that this phenomenon is a function of human nature over which society as an entity or the judiciary as an element of it, has literally no control. Nevertheless, the accuracy of Pound's observations under this first major category is undeniable and even more apparent today than they were in 1906.

Under causes of dissatisfaction resulting from the Anglo-American system, Pound listed five. First, he said,

there was an incompatability between ". . . the individualist spirit of the common law . . ." and (the) "collectivist age."[25] The common law, said Pound, had been created as a result of a need for the protection of individuals and their rights. But, alluded Pound, as the interaction of society became greater, the emphasis in the late 1800s and early 1900s had switched to a concern for the protection of society as a whole and the laws of individual rights were not so easily applied to this newer concept.

The second cause of dissatisfaction with the Anglo-American judicial system which Pound defined was the common law commitment to contentious procedure. The "sporting game of justice" had, according to Pound, become more important in our legal system than the definition of the truth. While this concept had been strongly curbed in England, it had seemed to thrive in the United States by 1906 to the extent that judges in many cases had become nothing more than umpires, existing only ". . . to pass upon objections and hold counsel to the rules of the game. . . ."[26] Further, said Pound, this concept of contentious procedure prompted counsel to look for errors in procedure so as to impose the "exchequer rule"[27] a concept no longer used in England, the country of its origin.

The next point that Pound made in regard to causes of dissatisfaction within the Anglo-American system was that there was a political jealousy created by the doctrine of

the supremacy of law. In other words, according to Pound, the fact that the judiciary sits in a position to rule on the constitutionality or simply the legitimacy of legislative actions places the former in what appears to be a "superior" position with respect to at least the legislative branch of government. That this situation causes friction and thus dissatisfaction cannot be denied, said Pound, but there is no clear solution to the problem.

Finally, Pound listed two additional flaws of the Anglo-American system which he claimed created notable dissatisfaction with the administration of justice. The first he noted was the absence of any stated philosophy of law and the second was the fact that Anglo-American law was primarily case law. With regard to the first criticism, Pound noted that laws arise piecemeal out of perceived need without regard to their position in an overall general philosophy. But, said Pound, when these laws are applied by the judiciary it is frequently their interpretation rather than their original design which attracts the greatest criticism. The fault for this situation, said Pound, rests with the legislature that will not change the law but relies, instead, upon the judiciary to "interpret" it. . . .

The fact that the Anglo-American system is primarily case law derives from this same flaw. The absence of detailed and specific law which is directly and currently applicable leads those seeking solutions to rely on decisions

made by others which support the particular legal position taken by litigants. That almost any decision desired has some precedent makes the court procedure something of a game with each of the opposing counsel citing those precedents favoring his positions. In addition to the "game" nature of such litigation, Pound emphasized, the "prodigious bulk" of this system--each case creating either a precedent or support for an earlier decision--is self perpetuating. The cause of dissatisfaction in this phenomenon, said Pound, was the appearance to the layman who, without appreciating any of the alleged advantages to this form of judicial administration, came to the realization that a decision of right or wrong probably depended on the ability of counsel to cite sufficient precedents as opposed to a decision based solely on the law and the circumstances of the case in question.

Before continuing on to that portion of Pound's 1906 speech to which this effort is primarily addressed, a pause for reflection is appropriate. To this point Pound has no claim to originality. Others in the legal profession had identified substantially the same problems before Pound and had dedicated no little comment to their discussion if not their solution.[28] To be sure, Pound's ability to expound on the obvious was probably second only to his ability to do so in a superbly entertaining and palatable manner. But the truth was that the problems identified by Pound to this point

in his speech were essentially traditional and philosphical in nature, promising of no practical solutions except to the extent that awareness of them tended to reduce their adverse effect. To this point then, Pound had been only summarizing and philosophizing--as was expected of speakers in similar circumstances--and leading up to what was to prove to be his main and, in retrospect, his most controversial comments of the evening. These comments, unlike those that preceded them, were to address problems which, according to Pound, could be corrected and which needed immediate attention. And Pound could not better have assured attention to what he was saying than by stating, the American ". . . system of courts is archaic. . . ."[29]

Pound's claim that the American system of judicial administration was archaic was based on three circumstances of that system. Simply put, Pound said that there were too many courts doing substantially the same thing, that state and federal court jurisdictions overlapped excessively, and that there was a distinct absence of management of judicial resources. To solve the first problem, Pound advocated a simplification of court systems similar to that accomplished by the English Judicature Act of 1873.[30] What Pound advocated was the reorganization of existing court structures into unified systems of one court with two tiers: One tier to be the sole court of first instance and the other to constitute the only court of appeal.[31] The advantages to such a

system, said Pound, are self-evident.

> Where the appellate tribunal and the court of first instance are branches of one court, all expenses of transfer of records, or transcripts, bills of exception, writs of error and citations is wiped out. The records are the records of the court, of which each tribunal is but a branch. The court and each branch thereof knows its own records, and no duplication and certification is required. Again, all appellate practice, with its attendant pitfalls, and all waste of judicial time in ascertaining how or whether a case has been brought into the court of review is done away with.[32]

Such a consolidation would also reduce the volume of legal comment and opinion dedicated solely to appellate proceedings which, said Pound, constituted "sheer waste."

Speaking to the matter of concurrent jurisdiction between federal and state courts, Pound said:

> Even more archaic is our system of concurrent jurisdiction of state and federal courts in causes involving diversity of citizenship; a system by virtue of which causes continually hang in the air between two courts, or, if they do stick in one court or the other, are liable to an ultimate overturning because they stuck in the wrong court. . . . All original jurisdiction should be concentrated. It ought to be impossible for a cause to fail because brought in the wrong place. A simple order of transfer from one docket to another in the same court ought to be enough.[33]

Finally, said Pound,

> Judicial power may be wasted in three ways: (1) By rigid districts or courts of jurisdictions, so that business may be congested in one court while judges in another are idle, (2) by consuming the time of courts with points of pure practice, when they ought to be investigating substantial controversies, and (3) by nullifying the results of judicial action by unnecessary retrials. American judicial systems are defective in all three respects.[34]

Of course, Pound's major criticism in this respect

was that nothing was being done to correct these shortcomings. But he himself offered little in the way of concrete recommendations to correct these problems.

The last significant cause of dissatisfaction with the administration of justice in the United States which Pound discussed in 1906 was what he called "causes lying in the environment of our judicial administration." Pound said that (1) there was a popular lack of interest in justice, (2) there was a strain on the legal system because it was expected to be both legally and morally just, (3) the legal system was suffering from a lack of legislative guidance, (4) courts were too involved with politics, (5) the legal profession had become more of a "trade" than a profession, and (6) the public's ignorance of the legal system detracted from the efficiency of that system. For these problems as for most of those which he identified, Pound proposed no solutions but simply implied that elimination or reduction of these causes of dissatisfaction would enhance the administration of justice in America.

Despite Roscoe Pound's eventual reputation as a jurist and scholar, his 1906 speech does not stand as the epitome of constructive criticism. Criticism it most certainly was but constructive it was not. Of the eight specific criticisms of the American legal system which Pound identified, to only one did he propose a concrete, practical and apparently applicable solution. That his only real

proposal--the simplification and unification of state courts--became the foundation for all subsequent court reform efforts is probably more a credit to Mr. Pound's subsequent fifty-eight years of clarification and dedication to this cause than to the completeness of his original speech. Nevertheless, it is true that the term "court reform" has become generally synonymous with "court unification"[35] and that Roscoe Pound's 1906 speech is generally acknowledged as the single catalytic event which launched this movement.[36]

In this thesis an effort will be made to evaluate the progress of court reform in the United States in recent years and to identify problems which have detracted from that progress. Toward the first endeavor, some parameters and qualifications must be established. Since the term "court reform" can apply as well to a raise in judges' salaries as to total structural reorganization of the judiciary it is appropriate to note that the scope of this work will deal specifically with the latter or, more properly, the extent to which state legal systems in the United States have been modified or undergone reorganization to meet the standards of simplicity and unity advocated by Pound in 1906. But since his original exposition on the subject both he and those who have come after him have made the standards far more definitive. Thus, whereas Pound simply advocated the reorganization of the court structure into a two-tiered system in 1906, in 1940 his advocacy extended to the accom-

plishment of the needed reorganization in three distinct phases or stages.[37] Today, most legal scholars agree that the court reform or unification effort can be subdivided into principal elements for discussion.[38] While I shall subsequently use another system, many agree that there are five such principal elements--(1) consolidation and simplification of court structure; (2) centralized management; (3) centralized rule making; (4) centralized budgeting; and (5) state financing.[39] It is the ultimate intent of this study to determine the status of court reform in the United States reflected generally in these areas.

Two more introductory comments are appropriate. First, there are some today who question the validity of the Pound concept of court unification based on the absence of empirical evidence that it is functional.[40] For my purpose, however, the Pound concept as well as the supporting and clarifying ideas of his contemporaries in the court reform movement are accepted simply as a basis for measurement because what reform has occurred to date has occurred because of them. While I believe Pound's concept is valid, it is not my purpose to argue or to demonstrate its validity. Secondly, although I have selected the year 1940 as my start point, there is no magic to that particular year. It is the year in which Pound published Organization of Courts and in which one of the more celebrated state court reform actions, the Missouri Plan, was adopted, but neither

of these events alone would have prompted the selection of that year. However, there does seem to be evidence that the court reform movement gained some momentum after 1940 that it did not have before and that year was arbitrarily selected so as to have a place from which to begin my research. With those comments made, it would seem appropriate to look briefly at the history of court reform to date.

Endnotes

[1]Paul Sayre, The Life of Roscoe Pound, (Iowa City: State University of Iowa, 1948), p. 149.

[2]Ibid., p. 148.

[3]Ibid.

[4]Ibid., complete work.

[5]Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," (pamphlet), (Chicago: American Judicature Society, 1956), p. 1.

[6]Ibid.

[7]Ibid., p. 3.

[8]Ibid., p. 10.

[9]Ibid., p. 17.

[10]Sayre, Op. cit., p. 149.

[11]Pound, Op. cit., p. 26.

[12]Robert C. Finley, "Judicial Administration: What is This Thing Called Legal Reform?," The Columbia Law Review, 65 (April, 1965), p. 569.

[13]Sayre, Op. cit., p. 149.

[14]Ibid.

[15]Ibid.

[16]Ibid., p. 73.

[17]Finley, Op. cit., p. 569.

[18]Ibid.

[19]Larry C. Berkson, "A Brief History of Court Reform," in Larry C. Berkson, Steven W. Hays and Susan J. Carbon, Managing the State Courts, (St. Paul: West Publishing Company, 1977), p. 13.

[20]Pound, Op. cit., p. 3.

[21]Ibid., p. 5.

[22]Ibid., p. 7.

[23]Ibid., p. 8.

[24]Ibid.

[25]For a more detailed discussion of this concept, see Roscoe Pound, "Do We Need a Philosophy of Law?," 5 Columbia Law Review, p. 339 and Roscoe Pound, "The Spirit of the Common Law," Green Bag, January, 1906, cited in Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," Op. cit., p. 10.

[26]Pound, "Causes of Popular Dissatisfaction," Op. cit., p. 12.

[27]The exchequer rule, as explained by Pound, was a rule of court which allowed favorable consideration of a demand for a new trial whenever errors in admission or a rejection of evidence could be cited as prejudicial to the outcome of litigation.

[28]Pound cited several of the more prominent reform authors of the day in his speech, including a German, Von Liszt and a Mr. Justice Brown whose exact office I did not attempt to determine.

[29]Pound, "Causes of Popular Dissatisfaction," Op. cit., p. 17.

[30]The Judicature Act of 1873 consolidated five appellate courts and eight courts of first instance into one Supreme Court of Judicature. The Act was not totally successful as a unifying measure, Pound notes, since the appellate authority of the House of Lords was restored in 1875. Pound nevertheless advocated "careful consideration" of this act as a "model modern judicial organization." Pound, "Causes of Popular Dissatisfaction," Op. cit., p. 18.

[31]For a further clarification of the structure of the courts which Roscoe Pound advocated, see Larry C. Berkson, "The Emerging Ideal of Court Unification," Judicature, 60 (March, 1977), pp. 373-374.

[32]Pound, "Causes of Popular Dissatisfaction," Op. cit., p. 18.

[33]Ibid., p. 20.

[34]Ibid., p. 21.

[35]Berkson, Op. cit., p. 373.

[36]Finley, Op. cit., p. 569.

[37]Roscoe Pound, Organization of Courts, (Boston: Little Brown and Company, 1940). In the preface to that work, Pound states that there are three distinct steps to court reorganization: (1) organization of procedures; (2) organization of the courts; and (3) organization of the administrative work of the courts. Pound said that the first step had to precede but that the others could occur simultaneously.

[38]U.S. Department of Justice, Court Unification: History, Politics and Implementation, by Larry Berkson and Susan Carbon, with the assistance of Judy Rosenbaum, August, 1978, p. 3.

[39]Ibid.

[40]Geoff Gallas, "Court Reform: Has it Been Built on an Adequate Foundation?," Judicature, 63 (June-July, 1979), p. 29.

CHAPTER II

STATE COURT REFORM: PROGRESS

If one dates the beginning of the court reform movement in the United States from Roscoe Pound's 1906 speech or, perhaps more appropriately, from the American Bar Association's eventual acceptance of Pound's propositions in 1909, even a discussion of more recent history must begin with a review of what took place from that time. As may be imagined from appreciation of the three years it took the ABA to grudgingly admit the validity of Pound's arguments, the legal community did not suddenly and of one accord embrace these ideas nor rally to correct these "causes of dissatisfaction." Lack of immediate progress in this area cannot really be blamed on the legal community's failure to respond. Pound had already addressed one of the major stumbling blocks to reaction, the difference in rate of progress between public opinion and change.[1] But no greater restraint to affirmative action in this regard was the very societal phenomena which had spawned the appreciation of the need for reform in the first place. Briefly, the beginning of the twentieth century in the United States, now historically known as the Progressive Era,[2] was marked by several socially significant and unusually disruptive influences. For example, the Industrial Revolution had led to a fantastic and

almost uncontrollable growth of industry. In conjunction with that industrial expansion came the need for additional manpower which then led to an all-time record rate of immigration. With the influx of immigrants came the development of industrial centers around existing cities, whose governments were completely incapable of providing for the rapidly increasing populations.[3] The shortcomings of the existing governmental structures gave rise to other alternate control systems, many of which, while actually providing some form of public service, were originally designed for the benefit of a select and, by most standards of the day, a corrupt few.[4] When, in these early years of the century, muckraking journalists exposed the foundations of these sometimes equally good and evil organizations to public scrutiny, the cry for reform grew. It was in fact in this environment that Roscoe Pound's speech was made and, with respect to the apparent importance of some of the other needs for reform, more easily forgotten. Indeed, it might well be said that the first thirty years after Pound's speech were marked by crisis after crisis which forced the need for legal reform to a significantly lower priority, at least in the national scheme of things. No sooner had Pound's speech gained acceptance in the legal community, than the United States was enmeshed in World War I. When recovery from the war might have culminated in a renewed legal reform effort, the depression of 1929 diverted the attention of all but the most

stalwart reformers to the matter of self survival. Thus, while it might be inaccurate to state that no progress was made during this period, one might well understand why there is little reason to afford this period of American legal history any more than passing comment.

As has already been said, the year 1940 presents no magic to the legal historian. In fact, many legal historians prefer to date the current efforts at legal reform from the early 1960s and indeed, it does seem that Roscoe Pound gained more converts during this period than at any time previously.[5] However, 1940 was the year of Pound's publication of Organization of Courts and "Principles and Outline of a Modern Unified Court System"[6] in which he presented definitive recommendations for correcting the causes of dissatisfaction with the administration of justice which he had defined some thirty-four years earlier. In addition to this major difference between these publications and his earlier speech, Pound had changed his opinion in the ensuing years and had decided by 1940 that the ideal court system needed three courts instead of two.[7] Certainly not the last of the differences between Pound's two efforts was the fact that in comparison to his relatively unknown status in 1906, in 1940 he was the well known and highly respected Dean of the Harvard Law School. So, while major efforts to follow Pound's lead may not have been immediately begun, this year is as good as any from which to discuss the modern era of court

reform.

There is, however, a major difficulty associated with any discussion of the progress made in state judicial reform, especially as it pertains to an historical perspective. It is simply that there is a distinct dearth of detailed information about the status of legal reform or state court structures in the United States up until very recently. While it is true that research of the individual states' legislative actions, constitutions and literature of the period might well provide such information, it is also true that in the case of this effort, with some notable exceptions, research in such detail and of the nature required to be able to, for example, compare state judicial structures in 1940, passes well beyond the point of diminishing returns. In short, I have been unable to find a single document in which the structures of the courts of the various states in 1940 are either discussed, compared, or otherwise depicted.[8] Despite the convenience of having such a point of departure, this discussion will instead concentrate on the current status of court reform from which an understanding of the progress made in the past forty years may be derived.

It is also appropriate to qualify that which will be discussed under the general heading of the history of judicial reform for, as was discussed in the first chapter, almost anything which can be regarded as a change anywhere in the system can also be regarded as judicial reform. Such an

interpretation would then lead one to conclude that all states have made progress in this area which is simply not true. For the purpose of this historical summary, then, and determining the progress of judicial reform, I will rather arbitrarily divide judicial reform into three major categories. They are: (1) structural reform including unification and simplification, (2) centralization of the administrative functions of the courts to include management, and (3) budgeting reform, including state assumption of all or a portion of the financial burden of the judiciary.[9]

"If there is a single element that might be considered the heart of court unification, it is the consolidation and simplification of court structure."[10] Certainly, this was Roscoe Pound's major emphasis in 1906 and the very core of his 1940 work. It is in fact so focal to the subject of court reform that it is frequently thought to be the sum and total of that term. While it is not that, it is quite true that the progress of judicial reform can most easily be measured in terms of the extent to which the structure of a state's court system is simplified or unified. But this is something of a subjective measure on which there is a shortage of consensus. Pound advocated a two-tiered court system in 1906 consisting of one court at each level. By 1940, he had seen a necessity for dividing the lower tier into two courts of original jurisdiction--one each for major and minor crimes. There is in fact some disagreement even today

on which of the two organizations advocated by Pound is the most efficient.[11] Then too, Pound is not the only author of such ideal organizations. Today, the American Bar Association accepts neither of Pound's organizations, but instead advocates an organization which is, in effect, one of three tiers. Unlike Pound, the ABA sees no need for more than one court of original jurisdiction. On the other hand, it advocates two levels of courts of appellate jurisdiction, one an intermediate level to ease the load on the ultimate court of appeal.[12] While there are not more than four such organizations that are generally accepted to be congruent with the principal of unification and consolidation, it is evident that the accuracy of a measurement of progress in judicial reform based on structural reorganization is probably valid only to the extent that it indicates that an attempt to restructure has taken place, if the reorganization so undertaken was intended as a step toward consolidation or unification.[13] Still another qualification needs to be mentioned. Many of the states that have somehow modified their courts' structures since 1940 have somewhere included a statement to the effect that the objective of the restructuring was to consolidate or unify the judiciary. This statement alone, while indicating intent, does not, nevertheless, prove that the system subsequently established succeeded in doing that. For example, after determining that the court structure of Colorado was not fully consolidated, I came across the fol-

lowing statement made by the Honorable Edward E. Pringle, Chief Justice of the Colorado Supreme Court: "By way of introduction, let me open by saying to you that Colorado has a unified and integrated court system . . ."[14] A quick double-check of my data revealed that Colorado's state courts are in fact unified. However, Colorado's Constitution authorizes all municipalities of greater than 2,000 people to create their own courts, and these courts are solely responsible to the municipalities that create them. While I suggest that this means that Colorado's court structure is not totally unified, the fact that the State's Chief Justice considers it so is clear evidence of the lack of consensus in this area.

Having noted these rather general qualifications, the status of court reform in the United States based only on structural organization as of 1978 is shown in Appendix A. Worthy of special note is the fact that only eleven states have judicial organizations that are either identical or generally similar to any one of the four principal designs advocated by Pound or the American Bar Association over the past seventy years.[15] In direct contrast, there are no less than eleven that have five or more inferior courts of limited or special jurisdiction. By far the most common cause of this apparent violation of the generally accepted principal of unification seems to be the tendency of many states to consolidate the state court system but to

permit lesser governments to create their own courts as Colorado has done. While there may be some validity to an argument that these lesser courts are so limited in their jurisdictions that they are almost not courts at all or that they have little impact on the greater consolidated system, the fact that so many other states have done away with them completely tends to make such an argument weak as a justification for their continuance. Finally, it is appropriate to note the states that have all but blatantly ignored the principle of a consolidated judiciary. Georgia, Louisiana, New York, Tennessee, and Texas seem to stand out with seven, eight, nine, seven, and ten courts of limited or special jurisdiction, respectively. Even with these rather notable exceptions, however, it seems to me that it would not be inaccurate to state that great progress has been made in this area of court reform since 1940.

The second category or element of the court reform movement which provides a measure of its progress is the extent to which the administrative and management functions of the judiciary have been centralized. However, even more than the measure of court consolidation or simplification, this category requires extensive qualification if the technique of measurement is to provide valid data. It must be initially noted there is a difference between the administrative and management functions of court systems that have been unified and those that have not been so reorganized. Nevertheless,

dependent on the structure of the judiciary, it is not impossible for there to have been substantial progress in the centralization of the judicial administrative functions, to include management, while the court structure remains essentially unchanged. In order to understand this better, a brief explanation of the functions generally included in this category is in order.

Arthur T. Vanderbilt, former Chief Justice of the Supreme Court of New Jersey and contemporary of Roscoe Pound's, divided court management into eight principal functions:[16]

> assignment of judges to specialized duties; reassignment of judges to different courts; reassignment of cases; uniform record keeping; periodic reporting by judges about their work; appointment of court personnel; administration of court personnel; and centralizing the financial affairs of the judicial branch.

While these divisions are too specific for the purpose of determining whether or not these functions have been centralized, they are mentioned so that the reader will appreciate the extent of the administrative functions I am discussing.

It is interesting to note that while Roscoe Pound did note in 1906 that "judicial power" was being wasted by failure of the system to allow for the equitable distribution of case loads between courts and judges,[17] he made no mention of the administrative or management functions or of a necessity to consolidate them. Thus it was not until 1938

that Arthur Vanderbilt advocated that "one of the judges" be granted certain managerial functions of authority to improve the efficiency of the system.[18] When Pound published his Organization of Courts in 1940, he improved on Vanderbilt's ideas by noting that the ". . . supervision of the judicial-business administration of the whole court should be committed to the chief justice . . ."[19] Further, Pound acknowledged the need for a "responsible director," other than the chief justice, to act as an administrator for the chief justice.[20] Although Pound did not use the term, he is commonly credited with being one of the first court reformers to anticipate the need for court administrators[21] and to address their function. Thus it may be seen that one way in which to measure the progress made in the centralization of the judicial administration function and court reform in general might be to determine whether or not the system has a court administrator. Unfortunately, the validity of this measure is destroyed by the fact that every state does have a senior administrator of some kind to assist the chief justice or some other senior jurist in the administration of the court.[22] If an evaluation of the progress of court reform in terms of the centralization of the administrative function is to be made, then some more definitive criteria must be established. For lack of any better standard, I have chosen to rely on the data provided by a research project of the American Judicature Society, entitled State

Court Administrators, Qualifications and Responsibilities and to assign values to each state's judiciary, according to various criteria addressed by that project.[23] Appendix B is a recapitulation of selected data extracted from that project, with totals created. For the purpose of comparison, the states with the higher totals are considered to have progressed the furthest in this one facet of court reform. Since all states have accepted the principle of the need for a court administrator, I shall give greater consideration to this element in Chapter IV. For the time being, it is sufficient to note that while something less than an ideal comparative measure of court reform progress, the complete acceptance and implementation of this concept since 1940 is, at the least, absolute proof of the existence of that progress.

The third and final category into which I have divided court reform for the purpose of this paper is the centralization of the financial functions of the courts. This is perhaps the most difficult of the court reform elements to accomplish or measure and the one in which the least progress is found. It should be noted that Pound made no reference to the financial functions of the courts in his 1906 speech nor did he discuss them in 1940. In fact, this particular element of court reform is comparatively new, having only first been introduced in the American Bar Association's Model Judicial Article of 1972.[24] For this

reason, there is a distinct paucity of information available on this subject and what does exist is far from current. It seems appropriate however to briefly discuss the objectives of this conceptual ideal and to attempt to determine its status as an indicator of the progress of court reform.

As has already been explained, consolidation of the financial functions of the courts includes, for the purpose of this discussion, both the budgeting and financial management functions. Toward the former, the ideal is for the judicial branch to consolidate the budgetary requirements of its subordinate elements and to submit a consolidated budget to the legislature for approval. In fact, even in those states where this is generally the procedure, it is not uncommon for the judiciary's budget to be submitted through an executive branch department,[25] much like the federal Office of Management and Budget (OMB), which, after approval of the executive, submits it to the legislature. A major drawback to this system is the degree to which the executive branch can bring political influence to bear on the judiciary[26] and because such influence is generally accepted as being undesirable, this can be used as a measurement of the progress made in court financial reform. Another obstacle to the ideal process is the fact that in many cases, courts are partially self-supporting and states do not provide all the funds necessary for their operation. Since courts which partially support their operational costs from

fees obtained through legal decisions (i.e., fines and other administrative assessments) are somewhat more independent of the state, this too, serves as an element for measurement.

There are two factors which influence the extent to which a state's financial management can be said to be consolidated. The first is the extent to which the court administrative and management functions are consolidated because one cannot exist without the other. The second is, as was just mentioned, the extent to which the state provides the funds for the operation of the judiciary. In Appendix C, the data displayed gives the reader some indication of the extent to which each state has reformed, reorganized, or modernized its courts' fiscal activities.

Since this chapter is designed as a brief historical summary or, more precisely, a depiction of the progress of court reform in the various states as of today or at least this decade, Appendix D constitutes a brief recapitulation of the data displayed in the preceding appendices and a rank ordering of states in accordance with the apparent progress toward court reform made by each. The totals and the rank orderings deserve further comment.

First, it is apparent that the states which can be said to be leading the court reform movement seem to have consistency across the board. In other words, progress has been made in each area of court reform.[27] On the other hand, this is true of only the top four states; it is far more

common for states to have made major strides in one area and have shown virtually no progress in one or both or the others.

This is most assuredly an arbitrary ranking. In the first place, I determined what I would evaluate and how each element should be weighted. Although there seems to be little divergence between the rankings I have determined and those displayed by others in the field[28] I would caution the reader not to assume more fact than is displayed. For example, the difference between any two consecutively listed states is small indeed and in view of the weighting system I applied, may in fact be incorrectly ordered by any other standard. For example, I allowed a maximum of twenty-five points for structural consolidation while only fifteen points were awarded to a state with the best consolidated administrative function. Some may consider these equally important aspects of court reform or even give the latter greater significance. There is, as well, some question of the currency of my data. It is certainly true that in Appendices B and C much of the data was derived from older sources for lack of any more current ones. While this fact does not invalidate the data presented, it is significant enough to note for those readers who may be interested in greater currency.

While I have not presented a chronological history of court reform accomplishments over the immediately preceding forty years, the reader must appreciate the progress

made in that period from the discussion of the circumstances which existed subsequent to 1906 and before 1940. In that regard, Charles S. Desmond, a former chief justice of the New York State Court of Appeals, summed it up quite well when he said:

> Future social and legal historians will surely report that in the past twenty-five years there have been more advances in court procedures and management than in the previous century. . . . The change has been remarkable.[29]

But while one may be inclined to agree with Desmond, there is cause to question the optimism of the following comment found in an historical synopsis of the same period:

> An objective trend analysis would indicate that the pace of structural and management improvements is quickening and will continue to accelerate. . . .[30]

In spite of all the progress that has been made, there are very obviously obstacles to that progress which have limited it and which must still be overcome. Thus, while a look back for encouragement is not inappropriate, the greatest attention must be given to the future and to the definition of the constraints on court reform which must be overcome if this progress is to continue. Let us look at some of these constraints now.

Endnotes

[1]Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," (pamphlet), (Chicago: American Judicature Society, 1956), p. 6.

[2]For a brief discussion of the causes for the appreciation of the need for reform and the Progressive Era, see U.S. Department of Justice, Court Unification: History, Politics and Implementation by Larry Berkson and Susan Carbon with the assistance of Judy Rosenbaum, August, 1978, p. 1.

[3]For a brief but complete review of this portion of American history, see Richard N. Current, T. Harry Williams and Frank Freidel, American History: A Survey, Volume 2: Since 1865, (New York: Alfred A. Knopf, Inc., 1971), pp. 435-461.

[4]Ibid. For example, although introduced in the late 1800s, labor unions, under often less than ideal leadership and for sometimes less than honorable purposes, rose to a new prominence during this period. So too was this period marked by the growth of power of political "bosses" who, by simply providing their own forms of public service, made themselves and their "machines" more important, more appreciated, and ultimately more desirable than many legally constituted governments.

[5]U.S. Department of Justice, Court Unification, Op. cit., p. 2.

[6]Roscoe Pound, "Principles and Outline of a Modern Unified Court System," Journal of the American Judicature Society, (April, 1940), p. 229.

[7]Roscoe Pound, Organization of Courts, (Boston: Little Brown and Company, 1940).

[8]It is interesting to note that the one single document published in 1940 that pretends to be a comparative summary of state organizations and activities, The Book of States, 1939-1940, published by the Council of State Governments (Lexington, Kentucky), makes no mention of improvements in or reorganization of the state judiciaries.

This may in fact be indicative of the importance of the movement as far as those who headed state governments were concerned. Conversely, in addition to charts depicting the number of traffic courts and details concering marriage laws of the various states, there was one chart in the 1940 edition which depicted the ways in which judges were elected,

appointed or otherwise assigned in each state. Since 1940 was also the year of the adoption of the much heralded Missouri Plan, a legislative act designed to improve the process for selecting judges; this, at least, is one indication that something was indeed happening.

[9]Allan Ashman and Jeffrey Parness, "The Concept of a Unified Court System," DePaul Law Review, 24 (Fall, 1974), as cited in U.S. Department of Justice, Court Unification, Op. cit. Ashman and Parness are the authors of this particular division of court reform. I have chosen to use them for simplicity because it seems to me that the consolidation of administration is the major element into which centralized rulemaking falls and there is no reason to separate the fiscal functions of the courts for this discussion.

[10]U.S. Department of Justice, Court Unification, Op. cit., p. 4.

[11]Ibid., p. 5. A distinction needs to be made between number of courts and tiers. Pound always advocated a two-tiered system. In 1940, however, he recognized the need for three courts, two at the lower level and one supreme court.

[12]Ibid., p. 7.

[13]This point is made simply because there are several examples of judicial reorganization in conjunction with other activities, such as reorganization of voting districts or municipal governments that had nothing whatsoever to do with judicial reform.

[14]Edward E. Pringle, "Fiscal Problems of a State Court System," in Larry Berkson, Steven W. Hays and Susan J. Carbon, Managing the State Courts, (St. Paul: West Publishing Company, 1977), p. 251.

[15]For a brief description of the four unified designs of court structure advocated by Pound and the ABA since 1906, see Larry C. Berkson, "The Emerging Ideal of Court Unification," Judicature, 60 (March, 1977), pp. 372-382.

[16]Arthur T. Vanderbilt, Improving the Administration of Justice--Two Decades of Development, (Cincinnati: University of Cincinnati, 1957), cited in U.S. Department of Justice, Court Unification, Op. cit., p. 7.

[17]Pound, "Causes of Popular Dissatisfaction," Op. cit., p. 21.

[18]Arthur T. Vanderbilt, "Standards of Judicial Administration Adopted," Journal of the American Judicature Society, 22 (August, 1938), pp. 66-71, cited in U.S. Department of Justice, Court Unification, Op. cit., p. 7.

[19]Pound, "Principles and Outline," Op. cit., cited in U.S. Department of Justice, Court Unification, Op. cit., p. 7.

[20]Ibid.

[21]U.S. Department of Justice, Court Unification, Op. cit., p. 8.

[22]The Council of State Governments, The Book of the States, 1976-1977, (Lexington, Kentucky: The Council of State Governments, 1977), Table 6.

[23]Rachel N. Doan and Robert A. Shapiro, State Court Administrators: Qualifications and Responsibilities, (Chicago: The American Judicature Society, 1976).

[24]U.S. Department of Justice, Court Unification, Op. cit., p. 12.

[25]Carl Baar, Separate but Subservient: Court Budgeting in the American States, (Lexington, Kentucky: D. C. Heath and Company, 1975), p. 25.

[26]Ibid.

[27]It is probably appropriate to note that both Alaska and Hawaii, as the newest states, also have the newest state constitutions. Therefore, their court systems are, for all practical purposes, newly created rather than changed and the amount of effort required in those states to adopt court reform practices has probably been comparably less than would have been required in any other state.

[28]U.S. Department of Justice, Court Unification, Op. cit., p. 217.

[29]Charles S. Desmond, "Current Problems of State Court Administration," The Columbia Law Review, 65 (April, 1965), p. 561.

[30]The Council of State Governments, The Book of the States, 1977-1978, (Lexington, Kentucky: The Council of State Governments, 1978), p. 87.

CHAPTER III

STATE COURT REFORM: PROBLEMS

Despite the overwhelming evidence that the state court reform movement in the United States is not only alive and well, but growing by leaps and bounds, there are voices in the literature warning of the possibility that this progress may not necessarily continue. The threat to this progress, say those who question its continuance, is double-edged. On one side are the constraints to this reform which are continuous obstacles to greater improvement. On the other side is the lack of empirical evidence to support an argument that the reformed organizations and procedures are in fact more efficient than those they replaced.[1] Overcoming this threat is also a two-sided process consisting of identifying and overcoming the constraints on one hand and developing the empirical data to prove success on the other. While the latter is a comparatively new requirement which will be given greater attention in Chapter V, constraints on court reform have existed since before 1906 and continue to be a major and increasingly more influential factor in limiting both immediate and long range planning progress. For this reason, there is an abundance of literature dedicated to their identification. While much of this literature is dedicated to problems and solutions of a local nature,[2]

that which remains is so extensive and diverse as to preclude one from obtaining an accurate perspective without a great deal of additional research. The intent here, then, is to provide the reader with a general overview of this subject in order that the problems and progress of state court reform can be better appreciated. What follows is simply a summary of some of the more pervasive literature on constraints to court reform and pretends to no originality on my part. On the other hand, I have taken the liberty to define the parameters of this discussion so as to exclude consideration to those constraints which, despite their importance generally to the court reform movement, do not directly influence the three principal areas of court reform which were discussed in the preceding chapter.

The preponderance of the literature *on constraints* to court reform is written from extremely narrow perspectives. The principal reason for this is that the various elements of court reform are quite complex and, as was demonstrated in the preceding chapter, the subject does not lend itself to summary simplification. For example, literature in regard to constraints on court unification,[3] centralization of court administration,[4] or court financing[5] is generally found separately because the subjects themselves are most oftenly discussed separately. Further, even in those cases where the author has attempted a general overview, the material is usually found to be quite narrowly

oriented.[6] That there is a difficulty in discussing constraints on court reform in a general or broad way gives rise to another important fact. Despite valiant efforts to do so, it appears impossible to organize or classify the various constraints to court reform in some acceptable way so as to facilitate their study or discussion. Those authors who have done so have, in my opinion, so narrowly oriented their perspective as to invalidate their methodology for all but their own literature.

For example, one author attempts to divide court reform into two categories, one of constraints external to the legal system and one of internal constraints.[7] Although a reasonably valid method of classification within the context of his writing, it is hardly all-inclusive nor does it take into account, for example, constraints of a political nature in those states where politics is a part of the judicial system. Another author attempts to distinguish between political and legal constraints by defining the methods through which efforts at court reform are undertaken.[8] While this definition serves well in a discussion of the direct and immediate efforts at court reform, it ignores the peripheral constraints which do not lend themselves to either category. For example, one might question into which of these two categories a constraint created by an administrative rule of a bureaucratic agency or, even more specifically, one based on the non-availability of resources

which might be obtained through either political or legal means or both, would be classified. In short, then, there is not now a system for legitimately classifying constraints on court reform, and in view of so many unsuccessful efforts to create such a system, it appears to me that no such system is likely to be forthcoming. Given this limitation and the inherent difficulty with discussing constraints on court reform in a broad or general way, I am obliged to introduce two qualifications to the discussion that follows. First, in order to provide some organization to this discussion, I will discuss the subsequently defined constraints in terms of the area of court reform upon which they appear to have the greatest or most noticeable influence. Since some constraints will apply across the board, their order in the discussion will be determined solely by chance. In other words, I am neither attempting to classify nor prioritize these constraints. Secondly, this is intentionally an overview of a subject about which I have already noted the difficulty with such a perspective. However, by limiting the scope of this discussion to constraints on the three principal areas of court reform already discussed and by admittedly addressing only those constraints of the greatest significance in the existing literature, I believe I have sufficiently narrowed the perspective so as not to contradict my earlier conclusion.

Before getting into the three principal areas of

constraint, however, I should like to momentarily address a single and clearly significant obstacle to court reform which does not lend itself to categorization. I am referring to a constraint which derives from a phenomenon known generally by the term "resistance to change" or, the desirability of maintaining the status quo. Roscoe Pound identified it as a cause of dissatisfaction with the administration of justice when he defined it as the difference in progress between public opinion and reaction by the judiciary.[9] In this case, Pound was referring to a rather understandable resistance on the part of the judiciary. However, this phenomenon and its role as a constraint to court reform deserve more detailed consideration. It is a law of physics which seems perfectly applicable to the social sciences, that all matter seeks equilibrium. Equilibrium is, in a social context, the status quo.[10] According to the laws of physics, any action which tends to change the state of equilibrium causes a reaction which tends to have the opposite effect, that is, to maintain or restore that balanced state. This reactive force is said to be equal and opposite in value to the force that created it, and inasmuch as it attempts to resist the effect of the original action, it is defined as resistance. A similar phenomenon can be observed in the social sphere although, unlike the physical science in which measurement of both forces is possible, it does not lend itself to laboratory

duplication or measurement. It is, however, clear that any effort toward social change is always accompanied by an element of resistance to that change. And, both in practical social applications as well as in the laboratory, the resistance must have an absolute value. When the force for change exceeds this absolute value of resistance the force has some effect on the system. However, it is also possible to build this changing force with such rapidity that when the absolute value of resistance is exceeded, there is what can be called an "avalanche" and until the resistance can again come to the value necessary to deter it, the change to the equilibrious state caused by the force can be comparatively violent. This same phenomenon can be said to occur in society when the force for reform becomes stronger than the resistance that can be applied against it. For historical evidence of this phenomenon, one need look no further than the American Revolution or the Civil War to see it in grand scale. In lesser intensity, the court reform movement is an equally valid example. The real importance of this evidence is that it proves the existence of an intangible social resistance to change even in the absence of a scale to measure it. Moreover, it is apparently an influence which, unlike the laboratory resistance, derives from basic human nature and thus is not controllable in any recognized sense. Since it cannot really be controlled, its effect cannot really be minimized as can the effects of the other

constraints to court reform which will be discussed subsequently. Consequently, this intangible, immeasurable, and poorly understood constraint to change of any kind is sometimes used to explain a lack of progress in the absence of any other apparent explanation. It is, nevertheless, important to an understanding of the constraints on court reform to be aware of the existence of this phenomenon, to appreciate how it is thought to develop, and to understand its significance as one explanation for a degradation or lack of progress in that area.

Unlike the constraint on court reform of natural resistance to change, the constraints which will be discussed subsequently do not always and automatically exist. Like the significance of their effect on the court reform movment, their very existence may be situationally dependent as well. While no constraint is discussed that did not have a significant impact in some quarter, the reader should be careful to remember this caveat lest incorrect inferences be drawn.

When compared to the circumstances of 1906 or even 1940, the constraints that remain to structural unification may seem quite minor. It is true in fact that this element of court reform has generally been accepted as necessary by almost everyone. However, minor as they may now be considered, the constraints that still exist are both clearly definable and pose a major threat to the continued progress of court reform. Since structural unification usually

involves a major reorganization of the courts, the first possible obstacle to court unification is the prescribed manner for changing the document(s) that establishes the structure of the courts. Although all but one state define their basic courts' structures in their constitutions,[11] some state constitutions permit wide legislative latitude in altering much of that structure.[12] In such states, changing the court structure is comparatively easy in terms of the administrative effort required but, in any case, the necessity for changing the establishing document is a time consuming, and frequently complex, requirement which affords those who want it an opportunity to create a formidable obstacle to the unification process.

One of the more significant constraints to structural unification--to all elements of court reform in fact --is the ever present threat of opposition based on political considerations. This is an extremely complex and multifaceted constraint which can be said to have existed to one degree or another in every case where court unification efforts have been begun. This rather inclusive statement is based on an appreciation for the pervasiveness of politics in all functions of government rather than on empirical evidence to that effect. Nevertheless, empirical evidence supports this contention in every case with which I am familiar. In order to discuss the impact of this factor in the detail it deserves, albeit briefly, it is appropriate to

look at politics first at the state level and then at the local level. At the state level, there has been a tendency for the other branches of state government to regard changes in and by the judiciary with some suspicion.[13] More often than not, this suspicion has been predicated on a fear that the judiciary is somehow gaining more power than the other branches, or at least more power than is desirable.[14] Legislators frequently exercise more than incidental control over some purely judicial functions, and this fact seems to lead some solons to look upon the judicial branch as something of a subordinate of the legislature.[15] Given this association, it is not surprising that such legislators tend to fear any change which might alter this relationship. A rather astonishing revelation is, however, that a number of state governors have opposed court reform efforts for substantially the same reason.[16] Not the least of the factors existing at state government level which bring politics to bear on court reform movements is the scarcity of resources, especially money. Despite the streamlining effect of structural reorganization, the process frequently results in increased judicial expenditure.[17] Legislators and other elected officials are naturally wary of any change which results in the reallocation of funds, especially when those funds are reallocated to a department from which virtually no influence on voters is obtained. Another rather common politically attractive subject is the fact that reorganiza-

tion of the court structure usually results in a necessity to alter the structure of other agencies within the criminal justice system to accommodate the increased efficiency of the courts.[18] In this case it is usually the heads of the agencies that anticipate this disruption who seek political recourse to prevent the change.[19] Finally, the courts are ultimately dependent upon the political processes for their resources and this constitutes a major political constraint to court reform[20] in that the courts must exercise political discretion in seeking change. In other words, the judiciary must be careful to recognize the facts of legislative power with respect to itself and avoid any implication that the proposed changes are designed specifically to alter the existing structure as it pertains to that power. Needless to say, there are other political factors of significance which can exist at the state level and which can impose constraints on all elements of court reform. Those few that have been discussed constitute some of the more frequently addressed factors.

At the lower levels of government, consolidation of the court structure usually means the destruction of the power bases of local politicians.[21] These power bases evolve either from the local politician's ability to influence the local court or from the fact that the local court can provide, through the judicial process, the monies necessary to operate the government at that level. Included

within the term "local politicians" in this context are the court clerks, many of whom enjoy power and prestige beyond that of the locally elected politicians and whose jobs can be most assuredly jeopardized by court consolidation.[22] Since these local politicians are close to their constituencies and exercise a degree of control over their votes, state legislators and other elected officials must be responsive to them. This is undoubtedly one of the surest sources of political constraint to court consolidation in the various states.

It is clear, then, that the opportunity for political influence as a constraint on the court reform movement is so great that an exception would only serve to prove the rule. Further, it is entirely possible, given both the ubiquity and emotion of politics, that this single element has had a greater effect on the court reform movement than any other single constraint. Recognition of its existence and its influence is, then, essential to minimizing its effect as a restraint to court reform progress.

Another constraint on structural unification in particular and court reform in general is the frequent inability of the judiciary to present a united effort in the advocation of change. Norville Sherman tells us that jurists and court personnel do not always support the reform effort for any one of the following reasons: (1) they may be completely satisfied with the system as it now exists;

(2) they may not understand the need for reform; (3) they may be afraid of losing their positions and/or power; (4) they may fear losing control over the courts.[23]

While Sherman assures his readers that the preponderance of those jurists who resist reform do so out of an honest apprehension for the hazards they perceive in it, the fact remains that such detractors tend to create a significant obstacle to the reform movement.

In somewhat the same vein, Sherman identifies another constraint on court reform worthy of note. ". . . the very size and complexity of the judicial system is a major problem," he says, because it "inhibit(s) understanding of the exact nature of problems, . . .".[24] More to the point, it is the size of the judiciary which precludes its members, as well as those external to the system who need to be convinced, from understanding the overall effect of proposed changes. Additionally, limited reform programs have little ". . . more than a temporary, cosmetic . . ."[25] effect on the system as a whole which tends to negate their value, especially as they appear to those who question the validity of reform. Finally, says Sherman, attempts at court reform can sometimes be likened to ". . . the problem of the child who attempts to push a two-story brick building from his path with a tricycle."[26] While this association may be somewhat ridiculous, there can be little doubt that the task of court reform is made no simpler by virtue of the

size of the system which needs to be changed.

Constraints on the centralization of the courts' administrative and management function fall primarily into three principal areas. First, since this effort involves a rather extensive rearrangement of both people and documents, the scarcity of resources--primarily money, but people and facilities as well--constitutes a major obstacle. Secondly, since the required reorganization rearranges the administrative function to the extent that jobs are both abolished and created, and many of the jobs subsequently created call for professional administrators not formerly available within the administrative function, those who currently perform the administrative functions of the courts and whose jobs are undoubtedly jeopardized are usually violently opposed to such changes. Finally, there is a distinct lack of uniformity in and guiding literature for the process whereby the consolidated administrative and management function is accomplished. This shortcoming includes the fact that the role of the court administrator is by and large unsufficiently defined and is compounded by the differences between the various state court structures which makes the correction of this problem in the near future appear most unlikely.

The first major obstacle to the centralization of the administrative and management function of the courts is one which applies as well to every element of court reform --the want of resources. The importance of money to the

court reform movement has already been discussed in association with the political constraints. However, along with the necessity to centralize the administrative function comes the obvious requirement to make it as efficient as possible. In other words, centralization of the courts' administrative functions requires the reorganization of the record making and keeping process in such a way as to make the vast existing files more accessible. This requires modern electronic data processing techniques and equipment which involves the initial expenditure of large sums of money.[27] In the absence of monies to meet these requirements--and this appears to be the rule rather than the exception[28]--the only choice other than to do nothing is to attempt the process without the required resources. While this may have a temporarily favorable effect in that the attempt may be defined as a clear indication of progress, unless the needed funds are forthcoming shortly thereafter, the eventual effect is to increase the constraint on this element of court reform by failing to demonstrate an improved administrative function.

The second major constraint to consolidation of the administrative and management function of the courts is a highly emotional one which, even if minimized, is not likely to be erased. It appears to be impossible in most cases to accomplish the desired degree of administrative reorganization with the personnel who formerly manned the individual

court's administrative functions. Part of the problem is simply that the standards for the new administrators are higher than the standards which the old administrators had to meet. In some cases, of course, the old administrators did not have to meet any standards at all.[29] Additionally, the adage that it is hard to teach an old dog new tricks seems to apply to these former administrators. They frequently do not appreciate the need for reform, legitimately think the old system is better, and even when their jobs are not in jeopardy, suspect that the whole purpose of the reform effort is to discredit their past job performance.[30] These former administrators, clerks of court by title, are usually not content to sit back and watch their jobs abolished or their roles in the administration of justice minimized. As has already been mentioned, some wield a good deal of political clout and their resistance to the reform can be quite strong. In order to ameliorate this situation, most states have retained the positions of clerks of court, while creating new positions of greater responsibility for court administrators.[31] This option has had little pacifying effect because resentment and professional jealousy tend to detract markedly from the efficiency of this kind of system.[32] When, either by virtue of the qualifications of the individual or because, as is frequently the case, the qualifications for the new positions have not been adequately defined, a former clerk is elevated to the position of court administrator, the

friction is not necessarily lessened. This is because it is generally the position, rather than the individual, from which the professional jealousy emanates.[33] Finally, the constraint caused by this circumstance is compounded greatly by the next major obstacle to administrative consolidation.

Perhaps no greater flaw exists as a constraining factor to administrative and management consolidation than the absolute dearth of guidance for its accomplishment. I do not, of course, refer to the literature which advocates and cites the advantages of such consolidation, for of that there is an abundance. I am referring to the type of literature which, by virtue of its technical rather than philosophical approach, would rarely be found in law reviews and the like. I am referring to literature which, for example, cites the floor space or data processing requirements for the administrative function of a court of a given size or jurisdiction or perhaps prescribes the ideal personnel requirements for specified administrative workloads. Of course, such literature does not exist in any quantity today because this element of court reform is brand new by any standard. In an attempt to fill this void, the American Bar Association has developed standards of judicial administration:

> A court system should have a modern system of court records, efficient procedures for storing, indexing, and retrieving information from its records and statistical systems for measuring and monitoring the flow of its work. The systems and procedures should

> assure that information entries and withdrawals are prompt, economical, and accurate; that necessary judicial and administrative decisions can be made with sufficient and readily available facts; and that periodic inquiries and analyses of the court system's operations can be made readily, accurately and continuously.[34]

But such rhetoric, while admirable in intent, falls far short of providing the kind of information that needs to be developed and made available to each state if the process of consolidating the administrative function of the courts is to be successful.

In the same vein, there is an equal paucity of literature in regard to the procedures of centralized management. From the prerequisites for and duties of a court administrator to a definition of the rulemaking authority of the chief justice, there appears to be little consensus. While there is no shortage of groups engaged in attempts to seek the answers to these questions, it is also unfortunately true that these groups generally represent conflicting views and are not likely to arrive at common conclusions.[35] Until agreement is reached, this shortcoming will continue to play a significant role in restraining court reform progress.

In the area of consolidation of the financial functions of the courts to include both budgeting and the expenditure of funds, most of the constraints already addressed apply to this single element. For example, politics play an extremely important role as a constraint to consolidating this function because consolidation places a good deal of

power in one judicial office and tends to reduce the effect and authority of the other branches of government on some of the subordinate elements of the judiciary. For example, when, in the course of this consolidation, a judicial agency which formerly submitted its budget requests directly to either of the other branches is incorporated into the centralized judicial budgeting function, the branch which previously exercised approving authority loses some of its power by virtue of losing fiscal control over that judicial agency. No less of an obstacle to this process of consolidation is the necessity to change the documents which prescribe the financial procedures of the state, and such changes can undoubtedly disrupt the organizations of other agencies, especially those involved with budget matters in the state. As has already been noted, since courts, in a legitimately unified system have no resources of their own and are dependent upon the state legislature for the allocation of them, those needed in excess of normal operating requirements to affect this financial consolidation must be obtained without an appearance of power grabbing. The same constraints exist by virtue of the effect of consolidation of the financial function on local levels of government. Anything which tends to take the control of funds away from the local level must meet with a particularly strong resistance developed by local officials. It is also true that there are those within the judiciary who oppose such finan-

cial consolidation for any number of reasons and who, by their opposition, create still another constraint on this element of court reform. Finally those constraints applicable to consolidation of the administrative and management function are also applicable to the consolidation of the financial function but there are some differences. While the scarcity of resources poses somewhat equal constraints on both efforts, there is probably less resistance on the part of administrative personnel to financial consolidation than to administrative consolidation.[36] In the area of the availability of literature upon which to base such a consolidation, the constraints are somewhat less significant because central financial administration is not, after all, a new concept to state governments. Thus, while there are peculiarities to judicial administration and management which make literature directed at that one field essential, the budgeting and expenditure functions of the judiciary can be substantially the same as in either of the other branches, and only limited constraints can be said to exist for the absence of such literature in this area.[37]

Finally, there is one obstacle to the consolidation of the financial functions of the courts which seems to be peculiar to this element and not covered within those constraints already discussed. It is the lack of consensus on how the judicial budget is managed once it has been prepared and submitted by the judicial branch. For example, assuming

the judicial branch is internally consolidated in accordance with the conceptual ideal, to whom should the budget request be submitted? In some states, an executive branch agency receives and reviews the judicial request where in others it is submitted directly to the state legislature. In either case, the executive may have a constitutional right of review and revision.[38] Some authors argue that such review, revision, or veto power on the part of the executive violates the principal of separation of powers[39] but the procedures followed by the federal government tend to provide a more persuasive argument in favor of this procedure.[40] While the lack of agreement in this area does not appear that significant on its own merit, its existence constitutes just one more point of contention upon which resistance to this element of court reform can be based.

I have, in the last few pages, attempted to summarize for the reader some of the more significant constraints to court reform in the areas of structural unification, administrative and management consolidation, and financial consolidation. I have done so quite arbitrarily, adknowledging that not only were these not the only constraints that could be identified within the parameters of court reform established but that the multitude of constraints which exist outside those parameters include some of even greater significance to the progress of court reform in the individual states. The value of this summary lies not so much in an

understanding of these constraints or even the extent to which they have individually deterred the progress of court reform, but in a recognition of the volume of resistance which has been generated to thwart the reform movement and an appreciation for both the impetus that has been required to have achieved the progress thus far accomplished and the effort that will be required to continue this progress in the future. Finally, this summary should have made obvious the fact that continued success in the court reform movement depends not only on the fact of a need for that reform but on a scientific approach toward defining the resistance in the form of constraints to that reform and generating the force necessary to overcome it.

Endnotes

[1]Larry C. Berkson, Steven W. Hays, and Susan J. Carbon, Managing the State Courts, (St. Paul, Minnesota: West Publishing Company, 1977), p. 6. Larry Berkson has been responsible for a significant amount of literature in this regard, most of which has been published under the auspices of the American Judicature Society.

[2]The term "local" here applies to the individual state systems and the preponderance of that literature is found in law reviews of the various law schools of the states concerned.

[3]Although acceptance of the ideal of court unification has become so common as to erase all but a few constraints to this element of reform, for an example of such separate literature, see Geoff Gallas, "Court Reform: Has it Been Built on an Adequate Foundation?," Judicature, 63 (June/July, 1979).

[4]For an example of literature which deals specifically with the constraints on the centralization of court administration, see James A. Gazell, The Future of State Court Management, (Port Washington, New York: Kennikat Press, 1978).

[5]For an example of literature which deals specifically with the constraints on the centralization of financial management of the courts, see Carl Baar, Separate But Subservient, Court Budgeting in the American States, (Lexington, Kentucky: D. C. Heath and Company, 1975).

[6]See U.S. Department of Justice, Court Unification: History, Politics, and Implementation, by Larry C. Berkson and Susan J. Carbon, with the assistance of Judy Rosenbaum, August, 1978.

Chapter Four of the above publication dealt with obstacles to achieving court unification, with the term "court unification" applying to all court reform. The preponderance of the chapter really deals with the constraints on court reform imposed by the participants both individually and collectively. When viewed from without, this is a narrow approach to constraints on court reform.

[7]Norville W. Sherman, "Obstacles to Implementing Court Reform," in Berkson, et al., Op. cit., p. 64.

[8]Berkson, et al., Op. cit., p. 72.

[9]Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," (pamphlet), (Chicago: American Judicature Society, 1956), p. 6.

[10]Sherman, Op. cit., p. 69.

[11]Only Vermont's court system is defined solely by legislative act although many other states' constitutions permit the creation of subordinate jurisdictions by the state legislature.

[12]The most common procedure for affording such legislative latitude is to establish the state supreme court by constitutional provision and to allow for the establishment of such interior courts as the legislature may deem necessary.

[13]U.S. Department of Justice, Op. cit., p. 82.

[14]Ibid.

[15]Jerome S. Berg, "The Need for Change and Flexibility," in Berkson, et al., Op. cit., p. 48.

[16]U.S. Department of Justice, Op. cit., p. 82.

[17]Ibid.

[18]Sherman, Op. cit., p. 68.

[19]Ibid.

[20]Ernest C. Friesen, "Constraints and Conflicts in Court Administration," in Berkson, et al., Op. cit., p. 38.

[21]U.S. Department of Justice, Op. cit., pp. 83-84.

[22]Ibid., p. 83.

[23]Sherman, Op. cit., p. 65.

[24]Ibid.

[25]Ibid., p. 66.

[26]Ibid., p. 67.

[27]Ibid.

[28]According to the Council of State Governments, State Court Systems: Revised 1978, (Lexington, Kentucky: The Council of State Governments, 1978), p. 27, thirteen

states have administrative staffs at the highest court level of less than ten people. Eleven more have less than twenty people on the court administrator's staff. Appropriations for the administrative offices, where separately identifiable, range from a low of $52,500 in New Hampshire where there is only one person on the court administrations staff to a high of more than six million dollars in Michigan. Only seventeen states exceed the million dollar mark for their court administrative function.

[29]For an interesting essay on the difference between the old clerks of court and the new court administrators, see Jerrold K. Footlick, "How Will the Courts Be Managed?," Judicature, Vol. 60 (August-September, 1976), p. 79.

[30]U.S. Department of Justice, Op. cit., p. 83.

[31]Larry C. Berkson and Steven W. Hays, "The Unmaking of a Court Administrator," Judicature, Vol. 60 (October, 1976), p. 135.

[32]Ibid., p. 136.

[33]William Freeman and Myrtis Kellum (Broward County Court Administrator and Deputy, respectively), interview held in Broward County Courthouse, Fort Lauderdale, Florida, September 24, 1979.

The county court administrator for Broward County, Florida, was, prior to his appointment to that position, an employee in the clerk of court's office. Since the clerk of court is an elected position, the incumbent clerk was not practically available for the appointment even if he had met any established prerequisites. In this case, however, prerequisites appeared to be experience in the court system and approval by the elected circuit court judges. Since assuming that position, the court administrator has frequently been at odds with the clerk of court despite the fact that there had been no cause for professional competition or jealousy between the two individuals previously. The court administrator and his deputy acknowledged that this friction seemed common within the realm of their experience in Florida. For a similar situation, see Richard W. Gable, "Modernizing Court Administration: The Case of the Los Angeles Superior Court," in Berkson, et al., Op. cit.

[34]American Bar Association, Commission on Standards of Judicial Administration, Standards Relating to Court Organization, (Tentative Draft), (Chicago: American Bar Association, 1973), pp. 92-93.

[35]For example, the American Bar Association, the National Association of Trial Court Administrators, and the Council of State Governments are three such organizations which are intimately concerned with this consolidation process. The conflicts arise, for example, when the ABA attempts to ensure that judges' powers are not undermined by too much authority being afforded to administrators, the NATCA attempts to ensure that the court administrator has sufficient authority to carry out his assigned duties and the CSG attempts to ensure that neither the judge nor the administrator infringes on the authority of the other two branches of government.

[36]This is not to say that court clerks and the like tend to support financial consolidation, for in fact, such reform deprives them of a function which has long been theirs alone. However, in view of the multitude of objections that clerks have to the former process, this latter process is somewhat less offensive. See U.S. Department of Justice, Op. cit., p. 83.

[37]For an in-depth analysis of the problems and procedures of judicial budgeting and financing, see Carl Baar, Op. cit.

[38]See Appendix C of this work.

[39]Baar, Op. cit.

[40]The Federal Office of Management and Budget is an executive agency which reviews and has some revision authority on all federal budget requests.

CHAPTER IV

THE COURT ADMINISTRATOR

If any one element of the court reform movment can be said to epitomize the progress made in the movement as a whole, it is the development of the function of the court administrator. While the latter's progress has not been in phase with the former's, there is a remarkable similarity between the way each has come to be accepted and implemented. For example, Pound spoke of court reform (but not administration) in 1906. Between then and 1940, comparatively little progress was made; it was a period in which the shortcomings addressed by Pound needed to be evaluated and the dissatisfaction of which he spoke needed to become more pronounced. Then, without much fanfare,[1] court reform in the various states seemed to begin in earnest.[2] A closer investigation, however, reveals giant strides initially, further efforts sometimes bogged down subsequently[3] and other states merely paid lip service to the concept of court reform from the start. Today, for example, while the concept of court unification is generally universally accepted among the individual states and the legal profession, there are at least eleven states that, based on Pound's definition of the multiplicity of courts, have thoroughly failed to accept even the most basic precept of court unification in prac-

tice.[4] Contrast the progress made in court reform then with a similar, albeit at a different rate, phenomenon in regard to the establishment of court administrators. Although Roscoe Pound first formally presented an argument in favor of a "responsible director" to ". . . provide competent business direction . . ." to the courts in 1940,[5] the fact is that such a need was recognized by some much earlier and, in fact, the federal government created the Administrative Office of the United States Courts the year before Pound's work was published.[6] State acceptance of the concept was quite slow in coming, with New Jersey being the first to establish a similar office in 1948.[7] Between 1948 and 1958, only fourteen additional states created such offices,[8] but in the twenty years since then, all states have created such a function. Like court reform itself, however, there are those states which have created the function to perform essentially as Pound would have envisioned it and others that have simply created the position apparently without any real appreciation of its purpose.[9] This similarity of progress between court reform and the establishment of the function of court administrators allows for a more detailed evaluation of the latter to lead to inferences about the former--and this is part of my objective.

There is, however, another, more compelling reason for giving more than passing consideration to the progress being made in the development of the functions of the court

administrator. It is simply that the want of definitive guidance in this one area of court reform is utterly intriguing. First off, it seems almost impossible that a consensus has yet to be reached among those concerned on the role and functions of a state court administrator despite the stated and implied explanations for it. Further, even in the face of this lack of progress, the obstacles to the creation of the required guidance as well as to obtaining the needed consensus just do not appear to be as great as it would seem they must be. Finally, I am inclined to believe that I might just be able to contribute something in the way of insight from a different perspective. Even if that is not ultimately the case, I can hope that my approach to and discussion of this problem will be no less valuable than the efforts of so many others who, like me, have apparently felt compelled to add their opinions and viewpoints to this perplexing problem.

A discussion of the function of court administrator ought to begin with a definition of the duties of that office. Since there seems to be little consensus on that subject, it is appropriate to discuss the "whys" of these duties as well. Once this is complete, one should note the primary sources of resistance to the position and finally conclude with some observations of what the position ought ultimately to be and how that can be attained. That is what I propose to do.

The first question is, what are the duties of a court administrator? The answer is that they involve the management of the courts' administrative matters. But there appears to be no accepted and precise definition of what constitutes the administrative functions of the court and, more importantly, how they are distinguished from the legal functions. The leading advocates of such a position never attempted to make such a distinction, preferring instead to imply that these functions were those that the senior judge would designate or could not, by virtue of his other duties, himself perform. For example, Roscoe Pound referred to a "business director" without specifying exactly what "business" he would direct.[11] In 1957, Arthur Vanderbilt, the first state chief justice to employ a court administrator[12] listed some functions he thought should be the responsibility of the administrative office of the courts:

> The Chief Justice and the other justices of the Supreme Court who are charged with the responsibility for the proper administration of the courts are all busy people preoccupied with their extensive judicial duties. If they are to be able adequately to discharge their administrative responsibilities it is essential that they have assistance. That is where an administrative office of the courts comes in. Its function is to supply the Supreme Court and the Chief Justice with the information that they need to decide intelligently what administrative action is to be taken and then to assist in carrying their decisions into effect. The office then performs what might generally be termed a staff, as distinct from an executive, function.[13]

Vanderbilt even went on to list several of the specific functions he considered to be staff, rather than executive,

duties. "One of the fundamental concerns of those responsible for the administration of a court system is to assure an orderly flow of litigation through the courts," he said.[14] This could best be done, said Vanderbilt, through an efficient monitoring and reporting of statistical data. In addition, he continued, "an administrative office can aid in the management of an efficient judicial establishment by taking care of the business affairs of the court--the housekeeping functions as they are sometimes referred to."[15] And again, we come to something of a dead end for there is only limited consensus on what constitutes the "housekeeping functions" of a court. Vanderbilt did, however, eliminate one possibility with which many have more recently disagreed. He did not envision that the administrator would supervise or assign judges; that, he said, was the function of a designated "administrative judge."[16]

> The main function of the administrative office of the courts is to relieve judges of the non-judicial functions necessary for the efficient operation of a court system, and to provide staff support for the judges in their administrative capacities. How the state court administrator fulfills this duty varies from state to state.[17]

The preceding statement, although uncharacteristic of the American Judicature Society, is a perfect example of the indefinite rhetoric that frequently surrounds the controversy of the role of the court administrator. It just seems easier to talk around the subject than to address it directly. In an effort, then, to look at the subject more

definitively, the following includes a list of duties or responsibilities commonly thought to pertain to the court administrator. This list is actually similar to one found in a questionnaire prepared by the American Judicature Society which was sent to court administrators in order to determine the scope of their duties:

(1) selection of trial court (subordinate) administration;

(2) supervision of trial court administration;

(3) participation in court rule making;

(4) responsibility for or participation in the assignment of trial court judges;

(5) preparation of the budget;

(6) responsibility for judicial fund management;

(7) participation in efforts to obtain legislative action in regard to the judiciary;

(8) participation in the research and/or recommendation functions concerning organization of the courts in general;

(9) dissemination of public information in regard to either or both operations and/or decisions;

(10) participation in long range planning for physical facilities;

(11) participation on any advisory bodies which exercise some supervisory function over the courts; and

(12) the provision of general services to any of the

courts.[18]

The preceding list of possible court administrator functions is, of course, in my opinion, fairly representative of those functions which the literature generally accepts as possibly within the realm of such offices. It is also true, however, that the preponderance of the literature tends to deal with the responsibilities of the state court administrator as opposed to the court administrators of the inferior state courts. I suspect that this is frequently done to avoid the greater controversy that usually arises as greater differences between courts are noted and personalities become more significant. It is also possible, however, that the inferior court administrative functions are assumed to be identical to those of the senior state court administrator. I do not think this assumption is valid. Before discussing the various functions listed above, then, I think it appropriate to list three more functions which some literature and my research suggests should be included as possible functions of court administrators, especially at the inferior court level. They are:

(1) Supervision of facilities, i.e., assignment of court rooms and management of other administrative areas.

(2) Supervision of all administrative court personnel from janitors to the personal secretaries of the judges.

(3) Management of juries and jury lists and of dockets.

Given the addition of these functions, I submit that this list is complete enough to permit a fairly detailed discussion of what a court administrator should and should not do. I shall, then, look at each of these functions with a view toward addressing the principal arguments and attitudes in favor of and against each so as to determine those that are the most persuasive.

The role of the state court administrator in nominating or selecting subordinate trial court administrators is subject to several significant variables. Not the least of which is the manner in which he, himself, is selected. There are presently four alternative methods in use.[19] He may be appointed by (1) the state's chief justice, (2) the supreme court as an entity, (3) a judicial or administrative commission, or (4) as is the practice in only one state,[20] the state legislature. I see nothing really wrong with any but the last procedure; I think it beyond the function of a state legislature to become involved with the administrative functions of the state's courts. I think it tends to violate the principle of separation of powers. While the role of the legislature in establishing the position, allocating funds to support it, and even creating the entire administrative organization of the courts is acknowledged, it seems to me that actual selection of the court administrator by the legislature would be equivalent to that body's selection of, for example, the state governor's chief of staff or,

perhaps, state cabinet members. In short, the state court administrator is the chief justice's principal executive assistant by any definition and his selection should be an endeavor internal to the judicial department or at least separate from either of the other two branches.

In regard to the other processes, only one other standard needs to be addressed. No matter who is responsible for initial screening and determining the qualifications of the applicants, the chief justice, as a minimum, must be involved in the final selection process. I would personally favor having the chief justice alone make the final decision but I recognize the problems inherent in this process. It seems to me, however, that if the administrative screening is accomplished in as pure, that is apolitical, an atmosphere as possible, these inherent problems can be reduced to an insignificant minimum. In short, the chief justice must not be allowed to select a political crony for this position unless he is as qualified as any of the other candidates.

Having then accounted for the selection of the state court administrator, what role should that official have in the selection of subordinate court administrators? If one sees the inferior court administrator as simply a subordinate of the state court administrator, he alone, again following an acceptable screening process, should make the final selection. If, on the other hand, one sees the same rela-

tionship between the inferior court administrator and the judge of the trial court that exists between the state court administrator and the chief justice, that is, one of principal and executive assistant, the authority for final selection of the inferior court administrator must belong to the senior trial judge or, as frequently is the case, all of the judges of the particular court he will serve. In practice, almost half of the states that have trial court administrators do not allow the state court administrator to have any role in the process.[21] Of the remainder, only one state leaves the selection to the state court administrator and the supreme court; the rest leave the decision, following the state court administrator's nomination, to the trial judge or judges.[22]

Despite its apparent lack of popularity, I favor this latter system. It seems to me that the state court administrator should be capable of and ought to be required to accomplish the initial administrative screening of applicants. Further, based on their qualification, the state court administrator, as the executive assistant to the chief justice, ought to be able to forward a list of qualified applicants with his recommendations to the trial court judge(s) for final decision. This process allows for more objectivity in the selection process and reduces the likelihood of patronage-like appointments while leaving the decision to the individual(s) who have the most to gain or

lose by virtue of the competency of the individual ultimately selected.

When one attempts to determine the extent to which the state court administrator should supervise the inferior court administrators, the first problem one usually encounters is one of the relationship between the principals in the system, the "pecking order", if you like. There seems to me to be a distinct hesitancy on the part of those who write on this subject to define where positions ought to be in the order of things, perhaps because there is a fear of offending someone. I have no such fear and I think the issue needs clarification. Further, I have no claim to originality for the system which I think should exist because it already works quite successfully elsewhere. It is based on the proposition that there should be two channels for control and communications. There should be a direct channel of communication between the chief justice and all of the lower court judges. Rules of court, to cite the most obvious, should be disseminated through this channel. Judges talk to judges using this channel and it is here that all judicial direction functions are accomplished. A parallel channel of communications exists ostensibly between court administrators although the channel really should be said to exist between superior and inferior courts. It is through this channel of communications that the administrative functions of the courts are accomplished. Given the

existence of these two distinct, if frequently indistinguishable, channels, the problems arise when the administrative channel becomes, or just appears to become, the direction channel. Envision, for example, that the state court administrator places a demand on the inferior court administrator which seems to impinge on the prerogatives of the subordinate court or, even worse, on the prerogatives of the trial court judges. This is a highly volatile situation, the fear of which, I would submit, is a greater obstacle to administrative efficiency than its actual existence. Nevertheless, despite their position in the clearly hierarchical judicial systems, trial court judges do not consider themselves to be, should not consider themselves to be, and are not, subordinates of the higher court's administrator.[23] But they are and must be subordinate to the higher court and the apparent contradiction which this causes is the one reason why the relative roles of all the principals must be clearly defined. In that respect, then, I submit that the state court administrator and, for that matter, inferior court administrators, as executive assistants, must speak <u>for</u> the jurists at their level. This is not simply an ideal, it is absolutely essential. A state court administrator, for example, must never impose a requirement on a subordinate court which the chief justice has not or, practically speaking, would not have approved. In other words, if and when a court administrator does impose such a requirement,

there can be no doubt on the part of the personnel at the lower level that the requirement was imposed, not by the court administrator, but by the chief justice or the judge of the court he represents.

Of course, this concept has a practical limit; if the court administrator is to serve his intended purpose, he cannot clear every little thing with his boss. But the obvious parameter is that if a court administrator does impose on the prerogatives of a lower court, the imposition can be confirmed and, if necessary, explained on that channel of communication that exists between jurists. Under such a system, only the relative authority of the jurists applies; the court administrator must never have, as an individual, a perception of superiority to any jurist at any level. Further, the court administrator who does not see and understand this precept cannot be effective.

If, as is frequently the case, the court administrator is already qualified in law or even a former judge, he must either appreciate the role he has assumed and act accordingly or resign; there are no other options in an efficient system.

Finally, at the risk of belaboring the point, this is not to degrade or otherwise undermine the importance of the position of court administrator. This is a comparatively new profession which, while still poorly defined, requires a degree of expertise and knowledge which many jurists will

never have. But the fact remains and, in my opinion, needs to be stated from time to time, that the relationship between judges and administrators is a professional one, similar to that between commanders and staff in the military (from which field the above suggested system of communication was derived); commanders cannot operate without their and higher echelon staffs and all staffs exist to support commanders. In such a system, the relative rank of individuals has far less significance than the prerogatives of the commander; and the latter are never violated by the staff even when the staff is of higher rank.

Returning then to the question of the extent to which the state court administrator should exercise supervision over the inferior court administrator, the answer is that he should not, as an individual, exercise any such supervision. The court administrator's supervision is the responsibility of the jurist he serves. What the senior court administrator should do is provide guidance to and obtain information from the inferior court administrator in accordance with established procedures and the guidance and direction of the state's chief justice. In other words, and more specifically, it is the established procedures, not the state court administrator, to which the inferior court administrators respond. In the few instances where the state court administrator does announce requirements which are not already established, they must, for all intents and purposes,

be requirements established by or with the consent of the chief justice.

Of somewhat lesser import is the question of what the established procedures should require court administrators to do and who should establish those procedures. To take the last question first, it really does not matter who establishes the procedures, provided that they are established by groups or persons who are knowledgeable in administrative and management functions in general and the courts in particular. Further, the chief justice must be the final approving authority for those procedures. I personally favor the establishment of the administrative procedures of the courts through a joint effort of the court administrators under the leadership of the state court administrator. Then, among those procedures, there must be the specified requirements for inferior court administrators to provide certain data to the state court administrator so as to permit such things as statistical reports, budgeting and accounting reports, and the like. Inasmuch as uniformity is desirable, such things as the qualifications of staff members and their pay or the manner in which records are maintained must be defined by such established procedures. I see no limit to what may be included as long as the chief justice approves them and, somewhat belatedly, they do not violate what are, in the system in question, accepted as the prerogatives of the individual court or jurist.

On the matter of participation in rule making, I see little controversy except in one area. Most legal scholars will agree that the court administrator, as an executive assistant, should participate in rule making and, at the state level, only nine states do not afford the state court administrator that role.[24]

The controversy seems to arise when one distinguishes between legal rules and rules dealing with administrative functions. It seems to me that those court administrators who include membership in the bar or former experience as a judge as part of their qualifications for their current positions, would see no reason to be excluded from any rule making and perhaps they could in fact contribute. Nevertheless, the court administrator exists as an administrative assistant, not as a judicial assistant.[25] I submit that not only should he have nothing to do with judicial matters, and specifically judicial rules of court, but he must deliberately avoide ven the slightest implication that he is so involved. This is for the same reason that I think the court administrator must avoid even the appearance of superiority to any judicial office; judges do not want to believe that court administrators, simply by virtue of their position, are in a position to determine things that affect them. This would be especially true in the event of court rules which are unpopular.

Finally, I acknowledge that all court rules are not

immediately separable into either legal or administrative categories. When they are not, it remains with the chief justice to decide whether he needs the expertise of the court administrator to make his decision. It should be remembered that, no matter the nature of the rule, it is always the chief justice who makes decisions and rules--never the administrator.

The assignment of trial court judges involves two distinct actions: (1) determining the judicial case loads and necessities and (2) the decision to assign jurists to meet requirements. In keeping with the preceding comments in regard to the role of the court administrator, it seems to me that the first action is well within the purview of the court administrator. In theory, at least, one would expect the state court administrator to advise the chief justice of the case loads and where judges are needed. Practically, one might also expect the state court administrator to be knowledgeable enough about the individual judges and their capabilities to advise the chief justice on assignments. Of course, some chief justices do not want such advice but, it is again the chief justice, not the court administrator, who makes the decisions. There should never be even the slightest implication that the assignment of jurists is the function of any but a more senior jurist. Sixteen states currently permit the court administrator to assign trial court judges; twenty-two others permit the state

court administrator to participate in an advisory role.[26]

Management of the judicial budget is a subject of such controversy in so many areas that one would almost assume that the court administrator's role therein is just about accepted. Further, when one thinks in terms of consolidated administrative functions, it is not unusual that the budgeting function is considered to be a part of that consolidation. In fact, a major factor which tends to interfere with the court administrator's assumption of this function is that it is frequently not consolidated. Progress in that regard has not really kept pace with other elements of court reform in recent years.[27]

A good deal of resistance to both the court administrator's assumption of the judiciary's budgeting function--and consolidation in general--has come from court clerks.[28] Since I will discuss the court clerk's role in regard to the court administrator later in this chapter, suffice it to say now that the budgeting function, whether well accomplished or not, is an extremely important function to the courts--one which clerks do not, in general, wish to relinquish. Add to that the fact that many clerks have become quite proficient at budget management and one can see why they, in particular, see no reason for the court administrator to now assume that function.

The argument in favor of general centralization under a professional administrator is not at all strong in the face

of proven efficiency on the part of clerks in the budgeting function. However, individual circumstances notwithstanding, most who advocate court reform in general would probably agree that the budgeting function does belong to a consolidated and centralized administrative function under the control of a single manager and thus is a proper function for the court administrator.

If the budgeting function belongs to the court administrator, the question arises, should fund management also be included? The answer is, not necessarily! Although I previously discussed these functions under one heading, the fact is that they are separate functions which do not necessarily need to be accomplished together.[29] Further, although a valid point may be made that consolidation of the two functions is probably more efficient, the principal argument for making financial management a responsibility of the court administrator is the same as the one for the budgeting function--the necessity for professional expertise.

Inasmuch as the court administrator is the executive assistant to the chief justice, it seems to me appropriate that he be made responsible for affecting necessary coordination with any other governmental branch or agency. Of course, the principal argument against such latitude for this office is the fact that the court administrator then becomes involved to some degree in politics and, at least, tends to usurp what little political power the chief justice or judge

may have.

For these reasons, I think it appropriate that the chief justice or judge be free to decide the extent to which he uses his court administrator for this purpose. This solution can lead to severely limiting the court administrator's role in this regard, especially if the chief justice or judge in question is jealous of his political prerogatives. On the other hand, it seems to me that, given the choice of either the judge or administrator being politically oriented, and recognizing that, ideally, neither should be, the lesser of the two evils would be for the judge to be so oriented. This is not because I think that a politically oriented judge is good but that I think a politically oriented court administrator can do far more harm within a system. Although many may disagree, no states currently elect their administrators[30] which seems to demonstrate some acceptance of this reasoning.

Now while I do think the court administrator should be permitted to act as liaison for the chief justice, I think an important distinction must be made between those things which he may discuss or in which he may participate as a liaison representative and those things which require the chief justice or another jurist. Of course, I am again referring to those things which are specifically legal in nature as opposed to administrative. For instance, the court administrator may, in my opinion, deal with the legislature

on matters pertaining to additional administrative or clerical personnel requirements; he may even be able to discuss the requirement for additional legal personnel based on statistical data with which he is familiar. However, he should not, in my opinion, participate as a full member of any agency or group that exercises authority over the courts or determines such things as standards for judges or courts and the like. Note that I used the term full member because I can in fact envision a circumstance in which the advice of the court administrator might be extremely valuable to such a group. For example, and as suggested by the earlier list of court administrator duties, I can see the court administrator participating as a non-voting member of a judicial council.[31] Depending on their organization and purpose, these councils frequently assume the responsibility for judicial planning to include the preponderance of reform measures. Where their tasks take them into organizational/structural reform, the court administrator can be an invaluable asset; where their tasks involve, for example, disciplining of judges--and this is becoming quite common--the court administrator needs not and should not have any part. I am not sure how this distinction ought to be made when listing the functions of the court administrator. Perhaps simply distinguishing "legal" from "administrative" matters in the promulgating guidance for a court administrator and leaving the chief justice or judge to determine into which

category a particular matter falls would suffice. In any event, I think it more important to establish the ideal; it is doubtful that perfection of this distinction is possible or even necessary.

While the dissemination of information about the operation of the court need not necessarily be a function of the court administrator, and there are in fact others as well suited to it, there is no reason for the court administrator not to perform this function. And that just about constitutes the argument in favor of the court administrator doing it. As is probably apparent, this is not one of the major controversies over court administrator functions. On the other hand, the biggest argument against making this one of the court administrator's functions is simply one of public relations. Court clerks and judges are frequently elected; they need "press." Court administrators are not and do not.

In Broward County, Florida, the seat of the 17th Judicial Circuit for the State of Florida, judges and the county clerk are elected. There is virtually no public information program for the courts. There is a booklet published by the county commission entitled Broward County Commission . . . at your service!, which lists the functions of government and pictures the county commissioners. In it, the office of the court administrator is listed with a general information telephone number above a brief explanation

of the two courts--circuit and county--as to their jurisdictions and a statement that the court administrator's office "administers the activities of the 17th Judicial Court." Interestingly enough, the Broward County Court Clerk is listed also on that page and on the next three pages following with each function that the clerk's office directly oversees. While I considered this booklet an excellent public information vehicle, I asked the Court Administrator if there were any additional efforts to inform the public as to the operations of the courts in particular. It was his opinion that the courts received all the publicity they needed when election time rolled around for either judges or the county clerk of court and that no additional effort was needed.[32] While there is a growing concern about the extent to which the public is truly aware of the operations of its courts,[33] Mr. Freeman's opinion seems to be quite common today and relegates this subject to somewhat lesser importance for now.

The supervision and management of facilities at the individual court level is an accepted function of the clerk of court in most cases. Before the emergence of the position of court administrator, there was noone else to do it. With the consolidation of the administrative function, it is only logical that, for the sake of efficiency, the court administrator should assume this function. However, in those places where the clerk is firmly entrenched, this is

just one more responsibility that will not be transferred if there is any way to avoid it. This is the case in Broward County, Florida. The Court Administrator there is particularly annoyed by the fact that he does not control these assets[34] but any effort he might want to make is hampered by two facts. First, and incidentally the matter to which the preponderance of this chapter has been addressed, is the fact that there exists no guidance from anywhere which specifically delineates the functions of either the court administrator or the clerk of court. More to that later. Secondly, the court administrator just does not have the political power, influence or a sufficiently strong position with the judges to advocate reform actions which would clearly not be acceptable to the clerk of court.[35] Again, while today a comparatively insignificant issue, it promises to become more important as the demand for facilities increases.

Envision for a second the personnel situation that exists in many courts today. The clerk of court controls a rather significant staff in most cases. Each judge may have a personal staff--a secretary as a minimum. Then the new court administrator has a staff, usually much smaller than the clerk's staff. If the court reform movement has really made progress, all personnel were incorporated into the court administrator's operation. But in many courts, especially below the state level, this has not happened.

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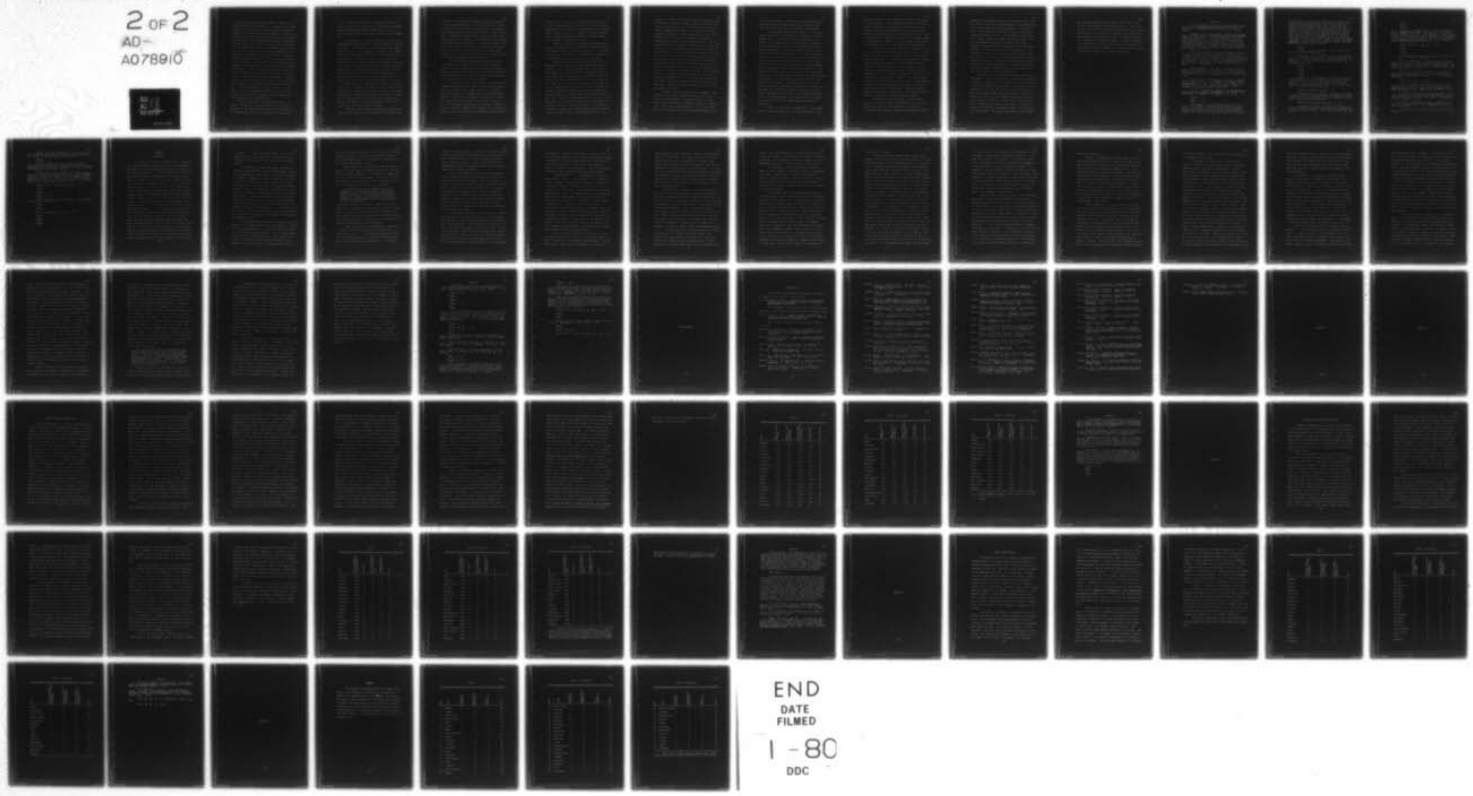

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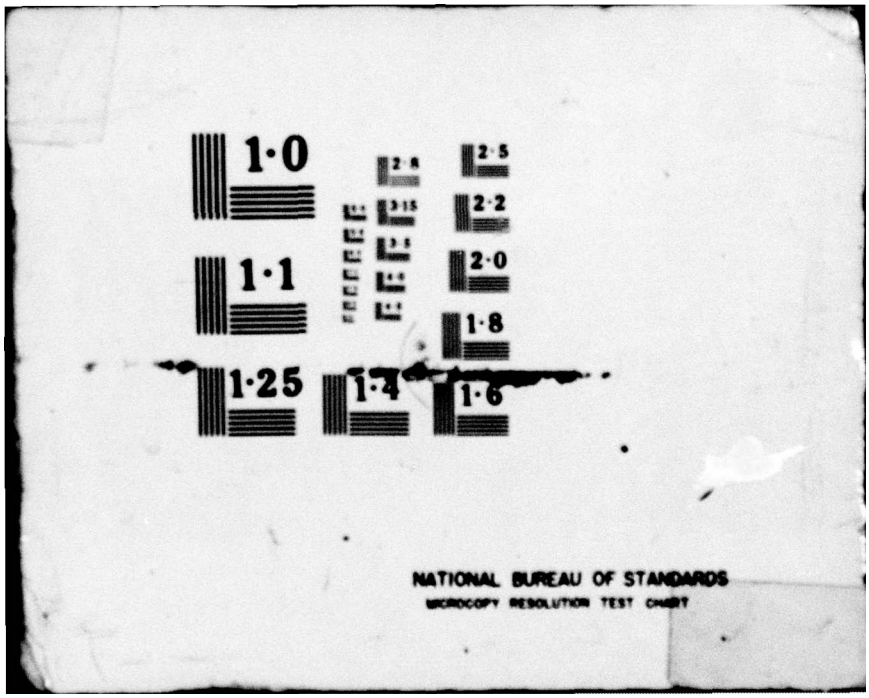
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Let us take Florida as an example again. Presently all three staffs just discussed exist. I asked the Court Administrator if they should not be consolidated. He acknowledged that he thought that some consolidation would be appropriate but--and I found this clear evidence of the power of the county clerk--he absolutely refused the suggestion that the county clerk ought to function under his supervision.[36] Further, and I believe his adamancy may well have been founded on an earlier unsuccessful suggestion, he insisted that he wanted no part of supervising the judges' personal secretaries either.[37] As an interesting epilogue to this interview, I had occasion to deal with some of the Broward County Clerk's staff and one of the Circuit Judge's secretaries. I believe I sensed a feeling of disdain for the court administrator's office in the County Clerk's office but, because I was dealing with employees, I surmised this was a loyal reflection of "the boss's" attitude rather than the result of some personal opinion against this office. There was no doubt in my mind, however, that the office of the Court Administrator and the office of the County Clerk of Court were separate and very probably conflicting operations in Broward County.

When I subsequently had dealings with one of the judges' secretaries, I observed another not at all rare phenomenon. She knew and liked the court administrator but her attitude was clearly one of superiority to that posi-

tion. This was so clear that I deliberately opted not to ask her opinion on the subject of consolidation of personnel under the Broward County Court Administrator's office. It was clear that she would have been insulted by such a suggestion.

A discussion of the last possible function of court administrators lends itself to a conclusion about the subject as a whole. If, as evidently is the case, the court administrator's function was designed to facilitate legal administration, if the court administrator is the principal executive assistant to the chief justice or judge, and if the consolidation of the administrative and management functions of the courts is a more efficient way to operate, then any function that is clearly administrative in nature needs to be placed under the purview of the court administrator. Further, and without qualification, this specifically includes those functions of the court performed by the clerk of court and that office itself when it is purely a function of the court.[37] Further, this must be clearly stated in the guidance that establishes or defines the duties of the court administrator. Without such guidance, a discussion of what the court administrator should do is purely academic; as is entirely too common, the court administrator exists solely to prove that the court system is reformed.

Although I have already and repeatedly answered the second initial question about who should be performing these

functions, one of the major arguments against the creation of the court administrator's function in the first place is the question of why clerks of court could not just become court administrators by title and continue in their current ways. Incidentally, judges are the only ones prone to ask this question more frequently than clerks and I will discuss the reason for that subsequently. It is true, however, that this is the lament of the court clerk and since they have been one of the two major obstacles to the creation and operation of the court administrator function, their role in this situation deserves further discussion.

The first argument advanced by advocates of the court administrator position for justifying relegating clerks of court to lesser positions is that court administrators are simply better qualified to perform the administrative functions of the courts. As ideal as that might be, it is simply not true for several reasons.

In the first place, if the clerk of court were not a competent administrator, he would not hold the job through the next election in most cases. Secondly, if education were a consideration, the experience of court clerks would probably, in most cases, outweigh the education of the new court administrators although in some cases, as we have seen, the new administrators are no more formally educated than the clerks.[38] Sometimes the argument is one of area of training; court administrators are management trained where

clerks are not. This is, of course, equally inaccurate; many court administrators, by virtue of the qualifications required may be less capable of management than the average clerk. In short, there is no tangible difference between clerks and administrators that makes the former categorically incapable of becoming the latter.

There is, however, an intangible difference which, while not insurmountable, is significant enough to prevent this changeover from occurring automatically. It is simply a difference of orientation. To understand this requires an understanding of the function of the court clerk.

Although judges have always been charged with the administration of their courts (even before there was a movement to provide them with assistance in this area), many judges found someone who would manage the details for them. This someone was the court clerk.[39] And there is nothing that the court administrator of today is expected to do that the clerk did not do or would not have done as the sole administrator for the court. One of the most significant differences between the old and the new administrators, however, is the fact that the clerks were not, in most cases, limited to performing only the function of court administration.[40] In fact, their primary duties were frequently so extensive that the functions of the court were relegated to comparative insignificance and were often performed by a deputy clerk or other lesser official. Fre-

quently the clerk's primary duties included being the local government's treasurer, recorder, auditor, and comptroller --which, while quickly said, involves far more functions than are immediately evident. In any event, the clerk is frequently required to perform duties which conflict or at least require him to be both a member of the executive branch and the judicial branch simultaneously.[41] This is a problem only when the needs of one branch conflict with the other but it is a problem that should not exist. When one notes that in all but six states these government executives and officers of the court are also politicians by virtue of the manner in which they attain office,[42] two important points become clear. First, the court clerk is often one of the most important executives of local government and as such, he or she frequently has a power base that perpetuates that role. Secondly, the simple possibility that a more efficient system may result if the system that perpetuates that power is reformed is hardly sufficient motivation for most court clerks to willingly abdicate their former roles and support that reform.

Further, their best and most valid argument is that there is no proof that increased efficiency will result. Given this understandable attitude on the part of court clerks, their reluctance to support any effort to change the status quo is equally understandable. It is clear, then, that the orientation of court clerks must necessarily con-

flict with the needs of the system for greater efficiency through professional administration and therefore differ from that of the apolitical professional administrator.

I have already implied that judges, too, have presented a good deal of resistance to the creation of court administrators. The reason for this is perceived to be similar to the reasons of the court clerks but of significantly less validity. Some say that judges do not want to accept administrative assistance because they do not feel that they need better administration.[43] Another possible reason is simply that jurists wish to avoid the implied possibility that the court administrator will exercise some control over the courts.[44] And finally, the least apparent but most important reason for judicial resistance to court administrators may simply be the fear that the court administrator will take over functions which are and should always be prerogatives of the judges and jurists alone.[45] Thus, whereas the resistance to court administrators by court clerks is based on a legitimate concern for their positions, the resistance presented by judges derives again from the lack of authoritative definition of the position and duties of the court administrator. The creation of such a definition could then do much to reduce rapidly this form of resistance.

I have, to this point, discussed what a court administrator ought and ought not to do, the resistance to that

function created by court clerks and the similar resistance of the judiciary. I have emphasized the fact that the absence of authoritative literature in this field has only served to intensify this resistance and may be the most significant shortcoming to court reform in this area. There is one other minor controversy which I need to address prior to concluding this chapter. It is the question concerning the qualifications of the individual court administrator.

The controversy arises simply from a question of the type of education and experience he ought to have. I think most would agree that court administrators need to be educated persons, that is, at least college graduates, although sixteen states do not now have such requirements established.[46] Of the states that require a formal education, all expect advanced degrees; seventeen require their court administrators to be lawyers and members of the bar and nine require prior experience as a judge.[47] Only three states accept an advanced business or public administration degree as partial qualification and only one state, South Dakota, lists this as its only educational or experience requirement.[48] The question is, should the court administrator be primarily a jurist or a business oriented manager?

The answer to this controversy is quite simple. Neither of the above titles is appropriate; the only real prerequisites is that the administrator be just that, a professional administrator capable of performing the admin-

istrative and management functions of the court better than the average jurist and more knowledgeable in the operations of the courts than the average businessman. Having said that, I should add that there are two notable reasons why judicial personnel are apt to be less ideal for this position. First, lawyers and judges traditionally have little or no management training.[49] Secondly, since I have repeatedly emphasized the subordination of the court administrator to the judicial positions in the system, it is reasonable to expect that lawyers and former judges would have difficulty in this role. With the exception of these limitations, however, the controversy surrounding the qualifications of a court administrator is really quite minor and would probably be erased entirely if the duties of the court administrator were identified first.

In addition to the similarity between the progress being made in the court administration area and court reform in general, it seems to me, in conclusion, that the latter is very much dependent on the former. The position of court administrator is, after all, the only really new function requiring another professional in the system. As such, it appears to me that the court administrator symbolizes the reform movement. Until now, reform of the system has generally originated from without, with those in the judicial system being limited in the degree to which they could support the movement. Now there is one person in the system

who exemplifies reform and, it seems to me, ought to have the role of continuing the reform from within. I am not at all sure that court administrators regard their roles in this way but each, in his own way, is probably dissatisfied with some element of the system and would, if given the opportunity or authority, bring about change. I think it incumbent on the position to not only seek the required authority or opportunity to make the change, but to ensure that the change aids in perfecting the efficiency of the system.

Endnotes

[1]I have elsewhere implied that Roscoe Pound's 1940 publication of Organization of Courts may have been the catalyst to the progress of court reform in the United States.

[2]James A. Gazell, The Future of State Court Management, (Port Washington, New York: National University Publications, 1978), p. 6. It is interesting to note that there has been little or no effort to detail state court unification efforts until quite recently. My efforts to determine the status of the various state courts in terms of their structure in, for example, 1940 so as to identify with certainty the progress made since that arbitrary date were totally unsuccessful.

[3]The State of Missouri is a good example. Touted as a leader in court reform in 1940 when it developed the Missouri Plan, a provision for nonpartisan merit selection of judges, Missouri made substantially no other improvements in her judicial system until 1976. See Barbara Schulert and Bill Hoelzel, "Court Reform, the Unheralded Winner of the 1976 Elections," Judicature, Vol. 60, (January, 1977), p. 281.

[4]See Appendix A. This figure includes only those states which have five or more courts of limited or special jurisdiction and which do not, by virtue of the definition of consolidation used in that appendix, have a unified court system.

[5]Roscoe Pound, "Principles and Outline of a Modern Unified Court Organization," Journal of the American Judicature Society, Vol. 23 (April, 1940), pp. 225-233. Cited in Department of Justice, Court Unification: History, Politics, and Implementation, August, 1978.

[6]Arthur T. Vanderbilt, Improving the Administration of Justice--Two Decades of Development, (Cincinnati: College of Law, University of Cincinnati, 1957), p. 54.

[7]Ibid., p. 55.

[8]Ibid., p. 56.

[9]For example, the Administrative Director of the Courts of New Jersey is paid an annual salary in excess of $40,000, supervises a staff of over 200 and has an annual budget that exceeds one million dollars. In contrast, Arkansas has an Executive Secretary, ostensibly performing

the functions of a state court administrator, whose annual salary barely exceeds $25,000, who supervises a staff of eleven and whose annual budget almost equals $250,000. Neither of these examples constitute the extremes and, because there is far more to the effectiveness of a court administrative office than is represented by the data presented, I am specifically not judging Arkansas to have a less efficient system on this data alone. The examples serve only to point out the disparity that can exist between the various states' courts' administrative functions. See Rachel N. Doan and Robert A. Shapiro, State Court Administrators: Qualifications and Responsibilities, (Chicago: American Judicature Society, 1976).

[10]Ibid.

[11]Pound, "Principles and Outline of a Modern Unified Court Organization," Op. cit.

[12]Vanderbilt was the Chief Justice of the Supreme Court of New Jersey, a position he assumed immediately subsequent to the culmination of his efforts to establish the Administrative Office of the Court in that state. See Vanderbilt, Op. cit.

[13]Ibid., p. 72.

[14]Ibid., p. 73.

[15]Ibid.

[16]Ibid., p. 78. Beyond the literature which advocates the role of the court administrator in this function, sixteen state court administrators have been given the authority to assign trial court judges. In twenty-two others, the state court administrator has an advisory function. See Doan and Shapiro, Op. cit.

[17]Doan and Shapiro, Op. cit., p. 4.

[18]Included in this category, according to the questionnaire, are such services as research assistance in matters pertaining to court administration, management assistance or data processing assistance.

[19]See Doan and Shapiro, Op. cit., p. 124.

[20]Connecticutt is the only state that assigns the responsibility for selection of the state court administrator to its general assembly. See Doan and Shapiro, Op. cit., p. 30.

[21]Ibid.

[22]Ibid.

[23]Ernest C. Friesen, Edward C. Gallas, and Nesta M. Gallas, Managing the Courts, (Indianapolis: The Bobbs-Merrill Company, Inc., 1971), pp. 124-125, as cited in Steven W. Hays and Larry Berkson, "The New Managers: Court Administrators," in Larry C. Berkson, Steven W. Hays, and Susan J. Carbon, Managing the State Courts, (St. Paul, Minnesota: West Publishing Company, 1977), p. 191.

[24]Doan and Shapiro, Op. cit., p. 132.

[25]Ibid.

[26]Ibid.

[27]See Chapter III for a discussion of the restraints on centralized financial management.

[28]For a discussion on the role of court clerks as obstacles to the court administrator's assumption of the budgeting function, see Larry Berkson and Steven Hays, "The Traditional Managers: Court Clerks, in Berkson, Hays, and Carbon, Op. cit., pp. 175-187.

[29]For a very complete discussion of the judicial budgeting and fund management functions, see Carl Baar, Separate But Subservient, (Lexington: D. C. Heath and Company, 1975).

[30]Doan and Shapiro, Op. cit.

[31]For a concise history and explanation of these organizations, see The National Center for State Courts, Planning in State Courts: Trends and Developments, 1976-1978, (Washington, D.C.: 1978), p. 3.

[32]Interview with William Freeman and Myrtis Kellum, Court Administrator and Deputy Court Administrator, 17th Judicial Circuit of the State of Florida, Fort Lauderdale, Florida, September 24, 1979.

[33]Jack B. Weinstein and Diane L. Zimmerman, "Let the People Observe Their Courts," Judicature, 61 (October, 1977), pp. 156-165.

[34]Interview with William Freeman and Myrtis Kellum, Op. cit.

[35]Ibid. The Court Administrator in the 17th Judicial Circuit is appointed by the senior judge and serves at the pleasure of all the judges of the court.

[36]Ibid.

[37]In many cases, the clerk of court is a minor government official whose functions within the court are far less significant than those for which he is primarily elected. See Berkson, Hays, and Carbon, Op. cit.

[38]As of 1976, only 71 percent of the court administrators in Florida had college educations. Larry C. Berkson and Steven W. Hays, "The Unmaking of a Court Administrator?," Judicature, 60 (October, 1976), p. 136. In 1977, 63.5 percent of the clerks of court in Florida were college educated. Berkson, Hays, and Carbon, Op. cit., p. 180.

[39]Berkson, Hays, and Carbon, Op. cit., p. 175.

[40]Ibid.

[41]Ibid., p. 176.

[42]Ibid., p. 175.

[43]Hays and Berkson, "The New Managers: Court Administrators," Op. cit., p. 195.

[44]Ibid.

[45]Ibid.

[46]Doan and Shapiro, Op. cit., p. 126.

[47]Ibid.

[48]Ibid.

[49]Ibid.

CHAPTER V

CONCLUSION

I noted much earlier in this effort that few authors ever really attempted a general overview of the progress or problems of the court reform movement because the subject is so diverse and extensive. I noted further that in those few cases where authors do undertake such a discussion, their works are, despite the best of intentions, ultimately found to be quite narrowly oriented after all. So, too, has this work thus far had a definable set of limits. Specifically, I have, to this point, discussed court reform only in terms of those causes of dissatisfaction defined by Roscoe Pound in 1906. Moreover, only one of the four principal divisions of Pound's causes has been subject to consideration, that being the causes ". . . lying in our American judicial organization and procedure. . . ."[1] It is true, however, that the preponderance of the court reform effort in the United States has been directed toward the correction of these causes and that they are so general and all-encompassing that a discussion based on them is really quite broad. Nonetheless, in order that full justice be done to this subject, there are two additional areas of court reform to which some attention should be directed. The first area involves those causes of dissatisfaction defined by Pound under the heading

of causes ". . . lying in the environment of our judicial administration."[2] The second area involves those court reform activities that cannot be traced back to Pound's efforts.

The reader will recall that under the heading of causes of dissatisfaction lying in the environment of judicial administration, Pound listed six. Further, although he offered no suggestions for their correction, his words implied that, unlike those causes inherent to all legal systems or even those causes that are traditionally Anglo-American, these latter causes of dissatisfaction could be reduced or eliminated. Interestingly enough, even though these causes do clearly exist and are no less significant today than they were in 1906, they have received comparatively little attention in the court reform movement. For example, Pound noted that there was a ". . . popular lack of interest in justice, which makes jury service a bore and the vindication of right and law secondary to the trouble and expense involved."[3]

In the seventy-plus years since Pound made that observation, the situation has not only not improved, it seems to me to have gotten worse. In fact, the current attitude of "not getting involved" seems to me to be a clear manifestation of this ill defined by Pound. There appears to be nothing of substance in the court reform movement which addresses this problem directly although one might argue,

with little success I would think, that if the court reform movement in general results in a more efficient system, public participation will be increased by the reduction of the "trouble and expense" involved.

Pound said that a strain was put upon the law by virtue of the fact that the system was required to set moral as well as legal standards. In the absence of suggestions for the correction of this problem, I am prone to believe that Pound was not altogether sure that there was a way in which to divide the one from the other. He said:

> The present is a time of transition in the very foundations of belief and of conduct. Absolute theories of morals and supernatural sanctions have lost their hold. Conscience and individual responsibility are relaxed. In other words, the law is strained to do double duty, and more is expected of it than in a time when morals as a regulating agency are more efficacious.[4]

One imagines, however, that Pound's comments were more a lament of the times than a criticism of the judicial system and, if subsequent reform efforts are any indication, one must conclude that Pound should have left this subject alone. In any event, there have certainly been no reform efforts to separate law and morality in recent history.

Pound next pointed to a shortcoming in legislation as a cause of dissatisfaction with the administration of justice. He said, ". . . the crude and unorganized character of American legislation in a period when the growing point of law has shifted to legislation . . ."[5] placed a

strain on the legal system. One recalls that Pound's observations were made during the Progressive Era when government in general had all it could do to keep up with the social changes of the day. It is not then difficult to understand the reason for Pound's comment nor the circumstances that probably prompted it.

On the other hand, Pound's criticism was clearly directed outside the judiciary and not one to which court reform might have been addressed. There is, however, a close relationship between the internal administrative efficiency of the judiciary and the efficiency of the legislative branch as it pertains thereto. Thus, one might be inclined to argue that the court reform efforts directed toward the former were, in effect, alleviating the circumstance of legislative inefficiency addressed by Pound. Again, however, the association is weak and, in my opinion, not worth additional comment.

Pound's next criticism of the environment of justice has probably been given more attention by court reformers than any other in this particular grouping yet Pound afforded it but one sentence. "Putting courts into politics," he said, "and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench."[6] There is no doubt that Pound's observation was correct and there have been extensive efforts on the part of some reformers to find alternatives to this problem.[7]

Although merit selection plans appear to be the fairest and most efficient methods for selecting and maintaining judges,[8] it appears to me that no system completely eliminates politics from this process. Nevertheless, this element of Pound's criticism of the environment of judicial administration has not been ignored by the court reform movement.

Pound said that ". . . the making of the legal profession into a trade . . ."[9] was a major flaw in the environment of judicial administration because it altered the relationship between an attorney and his client to one of an employee to an employer. Although Pound did not further expand on this concept, one imagines that his criticism was based more on a high esteem for the profession than on a concern for the reduction of efficiency it may have caused. I would think it is true that in any lawyer-client relationship, both roles must apply. For example, there are undoubtedly occasions when the professional jurist advises the layman; there must also be occasions when the lawyer, as the employee in effect, is required to do the bidding of his client. In any event, as in the case of the apparent failure to separate law and morality, I think Pound's point may have been more puritanical than practical.

Finally, Pound criticized the environment of judicial administration for, in effect, its failure to keep the public informed of its workings and accomplishments. In the same breath, he said that the press was of no help in this

regard because of their frequently "ignorant and sensational reports."[10] While the court reform effort has had no perceivable effect on the functionings of the press, some states have attempted to improve the images of their courts through public information and relations efforts. For example, eleven states have actually established public relations offices within the judiciary, thirty-two states provide for publication of an annual "state of the judiciary" message and forty-five states now have a formal requirement for an annual performance report.[11]

Although really external to the court reform movement that I have been discussing, the role of the press in the courts deserves another brief comment because recent efforts on the part of the press to see more of what the courts are doing may in fact be contributing to alleviating the very problem Pound addressed. I am, of course, referring to rather recent efforts to introduce television to the courtroom. Those reformers who have chosen to support this action as part of the overall reform movement argue that such efforts are addressed to Pound's 1906 criticisms and are designed to dispel the image of legal proceedings being more of a ". . . mysterious private rite than an exercise in public governance."[12] Despite the obvious argument that greater public observation of the courts will reduce the potential for sensational and inaccurate press coverage, opponents to televised courts argue that such coverage will

tend to turn the courtroom into a sound stage and that the contentious nature of the procedures will become even more pronounced. Both arguments certainly have merit and we will undoubtedly see more of this controversy in the future.

In conclusion, little of what Pound talked about under this last heading or category of causes of dissatisfaction with the administration of justice has served as a basis for subsequent reform efforts. Of the only two such causes which have come to receive some reform attention, politics and the press, only the former can truly be traced to Pound's 1906 speech.

On the other hand, there are several elements of court reform which have developed which were not considered by Pound in 1906. Again, one can always make an association between Pound's general demand for reform on the basis of a need for greater efficiency and any subsequent reform action designed for that purpose but the fact remains that Pound was not, despite his brilliance and foresight, omniscient, and it is not likely that anyone in 1906 could have foreseen some of the newer needs for court reform. For example, Pound did not address the need for consolidated or centralized fiscal management in 1906. While he did not in fact really address the necessity for consolidating the administrative functions of the court until 1940, the centralized management of finance and budget is a comparably new element of reform which, as was seen in Chapter II and Appendix C,

is still in its infancy.

Even further beyond Pound's 1906 foresight was an element of court reform which is rapidly becoming one of the more controversial of all--internal discipline of the judiciary. Although there have been dishonest and incompetent jurists since the very inception of law as we know it, the sanctity of the closed profession of the law probably kept Roscoe Pound from addressing such problems in 1906. However, as the courtroom becomes more of a public place and as the press, whether seeking sensationalism or not, gains greater access to the internal workings of the court, any incompetence and dishonesty of jurists becomes far more apparent. Couple this with an apparent inclination on the part of the public in general to question those in authority and one can perceive what one author has chosen to label a "crisis of confidence" in the judiciary.[13] The newness of this element of court reform is probably more a function of public awareness than it is an indication that jurists have only recently been discovered to be unfit for any reason. However, the procedures which have generally been in effect for dealing with bad or poor jurists are obsolete[14] and were frequently only operable from within the judiciary. While it is fair to say that the demand for this element of court reform might have been external to the judiciary and even the judicial profession, the fact is that it is the judiciary itself that is now the moving force behind the establishment

of a code of ethics for jurists and the procedures for the elimination of dishonest or incompetent judges.[15] It is also true, however, that progress in this areas has been quite inconsistent across the board because the demand for it has been greater in some states than in others. For example, in those states where judges are elected for relatively short terms or are subject to recall procedures, the necessity for reform in this area is significantly less than in those states where judges may be appointed for extended terms. In any event, this element of court reform is one which Roscoe Pound did not address but which has become major to the movement in recent years.

Another rather significant element of court reform which, while a part of consolidation is nevertheless a separate element and one which could not have been foreseen by Roscoe Pound, is the integration of automated systems into the judicial structure. Many of the problems of efficiency addressed by Pound and others, especially subsequent to 1940, are so much more easily solved by automatic data processing systems than could ever have been envisioned even thirty years ago. It is in fact becoming something of a separate reform entity--this science of improving judicial operations with computers[15]--and while not yet measurable, certainly a future subject for the evaluation of court reform progress. It will undoubtedly become more important as the necessity for developing supporting empirical data for court reform

becomes more pressing.

Finally, a comparatively obscure element of court reform which seems frequently to invade the literature, is most often discussed under the court administrator's function but which may be becoming a separate entity, is one entitled courthouse planning and management. This field is concerned with such elements of courthouse design as lighting, heating, and maximum space utilization to list only a few.[17] It appears to be becoming something of a science unto itself but one which, in my opinion, may be carrying the court reform movement a bit far. And although it has not yet reached the state where it is subject to measurement, I suppose that it may someday also become an indicator of the progress of court reform.

I have attempted in the last few pages to broaden the scope of this thesis sufficiently so as to substantiate both the argument that this work does justice to a general overview of court reform in the United States and the conclusions that follow. I am content that the research accomplished in the preparation of this paper was sufficient enough to provide an adequate and accurate picture of the status of court reform in the various states. The conclusions that follow, however, while subjective, are, nevertheless, based on evidence in the form of measurable data. I suggest, therefore, that before the reader dismisses one or more of my conclusions as less than valid, further consider-

ation should be given to the data which I have compiled in the appendices to this work.

The progress of court reform in the individual states in the past forty years, especially in view of the obstacles thereto, has been nothing short of fantastic. When viewed in comparison to the years before 1940, it has been astronomical. When compared to other contemporary reform movements--equal rights immediately comes to mind--the progress of court reform has clearly established the precedent to follow. This conclusion is generally held by most authors in this field.[18] Although there are many reasons for this success, some of the more important ones deserve special note. First, there would be no court reform movement without the Roscoe Pounds, Arthur Vanderbilts, and the like whose continued efforts served as the pilot light to the flame of progress. Today, such individuals as Larry Berkson, whose works have been frequently referred to in this study, and such groups as the American Judicature Society and the Law Enforcement Assistance Administration[19] are unquestionably the driving forces behind this movement. Of equal or greater significance, however, is the funding provided by the U.S. Congress that provides for the planning and research in this area. Without this funding, and it may not in fact be sustained, court reform would not exist.[20] In any event, the need for court reform in and of itself has not been responsible for the success of this movement nor has

there been a snowball effect. The fact is that any successes achieved in court reform have been the result of concentrated effort against often severe resistance and the loss of any one or more of the elements that have created that effort might mean the end to further recognizable progress in the foreseeable future.

In contrast to the optimism of the majority of authors on the subject, I suggest that the court reform movement is encountering increasingly more effective resistance and that its progress will be markedly retarded in the not too distant future. I base this conclusion first on my assumption of the similarities between resistance to change in the physical sphere and that same phenomenon in the social arena. I believe that resistance to court reform, much like that which existed in 1906, is again building and must ultimately exceed the force being exerted in its favor. My premise is not, however, based solely on the scientific phenomenon alone; I believe that I can define the sources of resistance and their reasons for existence now. For example, I concur with Berkson, Hays, and Carbon when they say that ". . . in the not too distant future, substantial cuts will be made . . ." in the monies allocated for research and planning.[21] I think it clear that the increasing public economical awareness must result in greater fiscal responsibility on the part of the Federal government. This means that the Federal budget is going to be markedly reduced over time and

those expenditures most vulnerable to reduction are those that support long range or intangible efforts and those that are ostensibly state oriented functions. As this money dwindles, so must the support of the Federal agencies through which it has been funneled. Finally, organizations such as the American Judicature Society that have pursued such reform oriented research projects with the assistance of these agencies and funds must necessarily reduce their efforts which, in effect, increases the value of the resistance. I acknowledge that thfs alone will not necessarily sound the death knell for court reform if only because states can continue their own efforts in this regard. However, state efforts currently lack the consistency, uniformity, and coordination of the more successful and productive federal efforts[22] and even if the state programs can be improved, the delay which results from that process will simply constitute the increasing resistance.

Another major source of resistance to continued progress in court reform is the absence of empirical data to support or justify the reform that has already been accomplished.[23] In other words, despite the theoretical advantages to a consolidated court structure, for example, there is no empirical evidence to support the contention that the consolidated system is better than the former system. There are three principal reasons for this. First, data collection, if considered at all, is a function of court adminis-

tration and can best be accomplished if the administrative function is also consolidated. If it is not, accurate collection of the required data is probably impossible. Even if it is possible, the second principal detractor applies: the process of data collections has not been adequately established nor are there resources available to accomplish it in most systems. Finally, even if the data is accurately collected, there is no evidence to date to indicate that, once collected, it will substantiate the reform.[24] At best, it can demonstrate a degree of efficiency. At worst, there is no data available with which to compare it and the period of time over which the data will have to be collected in order to show some trend toward greater efficiency will in itself be prohibitive. Thus, when in the course of allocating funds, state governments are confronted with the absence of this empirical data, the chances that funds will be allocated for court reform are markedly reduced. Although I do see this situation changing after one or more states do succeed in establishing the data collection procedures and providing evidence of increased judicial efficiency, I submit that this will probably occur too late in the cycle I am predicting to preclude the decline of court reform progress initially.

Finally, the fight for court reform in the United States has been traditionally an uphill battle conducted by a comparative few. It would, except for rare exceptions,

be incorrect to categorize it as a manifestation of public sentiment in most cases because the public as an entity is rarely involved. Even when the reform requires public endoresement, such as when constitutional changes are involved, the little furor that may ultimately arise is usually created by the participants and not by the public in general. The point is that despite the apparency of the need for court reform to those very close to the system, there is not an overwhelming awareness on the part of the voting public that court reform is essential. Further, little of the effort expended toward court reform has been directed toward legitimately educating the public and this, I think, may become a major factor in constraining court reform in the future. I submit, for example, that it is really the public that will eventually cause state governments to reduce their expenditures for this effort and that once this occurs, the current momentum will be lost. In short, I concur with Roscoe Pound, when he said:

> Public opinion must affect the administration of justice through the rules by which justice is administered rather than through the direct administration. . . . But, as public opinion affects tribunals through the rules . . . these rules once made, stand till abrogated or altered. . . . The law does not respond quickly to new conditions. . . . It does not change until ill effects are felt; often not until they are felt acutely.25

The public has not felt the effects of a truly inefficient legal system and, unless or until it does, court reform will face ever-increasing resistance from that sector.

Although I am not certain that court reform has yet reached the acme of its success, I suggest that if it has not, it will do so quite shortly. Further, I am not at all certain of the time parameters of the phenomenon I predict. For the same reason that a man entering a dense forest cannot determine its depth, I cannot possibly know where exactly in the cycle which I foresee, the progress of court reform now is. It seems to me, however, that the "pace of structural and management improvement (has been) quickening"[26] for the last thirty-odd years and that this acceleration cannot continue indefinitely. Further, it seems to me quite likely that the momentum of this progress is slowing and that, barring the unforeseeable, the movement must ultimately peak and then decline. I submit that the start of the predicted decline is at hand.

This is, as far as I know, an original opinion. It seems to me that it should not be. The evidence I have cited tends to support it and it does not seem to me to be so radical a departure from common sense that it should be discarded out of hand. Nevertheless, if there is one shortcoming that seems to have traditionally pervaded the court reform movement it is undoubtedly a failure of long range vision and I suspect that the originality of my opinion is more a result of this propensity for shortsightedness than an indication that my reasoning is unsound. I submit that recognition of the probable, or even possible validity of

my conclusion could serve to lessen the severity of the effects of the predicted decline but I would think that it could not be avoided entirely. Further, despite the unattractiveness of the options, even if no preventive action is taken, the decline will be no longer lived than the period of inactivity which preceded this current period of progress. While I appreciate that the worst of eventualities may be unacceptable to reformers, the fact remains that court reform will not die as a movement and will probably never return to the status of inactivity that existed prior to 1906. Its future progress, however, will, in my opinion, depend predominantly on the efforts of the reformers like Berkson, Hays, and Carbon who, like the Pounds and Vanderbilts of yesteryear, must necessarily have longer range vision and perception than their contemporaries and who will undoubtedly continue to stir the pot of controversy for the benefit of all.

Endnotes

[1]Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," (pamphlet), (Chicago: American Judicature Society, 1956), p. 17.

[2]Ibid., p. 24.

[3]Ibid.

[4]Ibid.

[5]Ibid., p. 25.

[6]Ibid.

[7]For a concise discussion of the strengths and weaknesses of various selection processes, see Larry C. Berkson, "Selection of State Judges: Election or Appointment?," in Larry C. Berkson, Steven W. Hays, and Susan J. Carbon, Managing the State Courts, (St. Paul: West Publishing Company, 1977), pp. 134-141.

[8]Ibid., p. 141.

[9]Pound, Op. cit., p. 25.

[10]Ibid., p. 24.

[11]The Council of State Governments, The Book of the States, 1978-1979, (Lexington: The Council of State Governments, 1979), p. 82.

[12]Jack B. Weinstein and Diane L. Zimmerman, "Let the People Observe Their Courts," Judicature, 61 (October, 1977), pp. 156-165.

[13]Steven W. Hays, "Discipline and Removal of State Court Judges," in Berkson, Hays, and Carbon, Op. cit., pp. 150-163.

[14]Ibid., p. 151.

[15]Ibid., p. 160.

[16]For a discussion of computer technology and court reform, see James Gazell, "The Use of Technology: A Subsystemic Concomitant," and Gerald Blaine, "Computer-Based Information Systems Can Help Solve Urban Court Problems," in Berkson, Hays, and Carbon, Op. cit., pp. 283-291.

[17]Ibid., p. 306.

[18]Although there appears to be no contradiction to this conclusion, for clearly concurring opinions, see Geoff Gallas, "Court Reform: Has it Been Built on an Adequate Foundation?," Judicature, 63 (June-July, 1979), p. 28 and Berkson, Hays, and Carbon, Op. cit., p. 335.

[19]The Law Enforcement Assistance Administration is a division of the U.S. Department of Justice and the parent agency of the National Institute of Law Enforcement and Criminal Justice. Most references in footnotes or bibliography to the U.S. Department of Justice refer also to these sub-divisions of that department.

[20]Berkson, Hays, and Carbon, Op. cit., p. 335.

[21]Ibid.

[22]Ibid.

[23]Larry C. Berkson, "The Emerging Ideal of Court Unification," Judicature, 60 (March, 1977), p. 373.

[24]Ibid.

[25]Pound, Op. cit., p. 7.

[26]The Council of State Governments, Op. cit., p. 87.

BIBLIOGRAPHY

BIBLIOGRAPHY

For the most comprehensive bibliography on material in regard to court reform in general, see:

U.S. Department of Justice, Literature on Court Unification: An Annotated Bibliography, by Susan J. Carbon and Larry Berkson, June, 1978.

For a comparable bibliography on the literature which pertains to court organization and procedures in general, see:

Fremlin, Ronald H. (Ed.). Modern Judicial Administration: A Selected and Annotated Bibliography. n.l.: National College of the State Judiciary, 1973.

The following literature was specifically used for this thesis.

American Bar Association. Commission on Standards of Judicial Administration. Standards Relating to Court Organization. Tentative draft, 1973.

American Judicature Society. Courts of Limited Jurisdiction: A National Survey. Chicago: American Judicature Society, 1975.

Ashman, Allan. "Measuring the Judicial Rule-Making Power," Judicature, 59 (December, 1975), pp. 215-221.

Baar, Carl. Separate But Subservient. Lexington, Kentucky: D. C. Heath and Company, 1975.

Bell, G. B. "Improvements in the Administration of Justice," Texas Tech Law Review, 10 (1979), pp. 533-545.

Berkson, Larry C. "The Emerging Ideal of Court Unification," Judicature, 60 (March, 1977), pp. 372-382.

Berkson, Larry C. and Hays, Steven W. "The Unmaking of a Court Administrator?," Judicature, 60 (October, 1976), pp. 134-139.

Berkson, Larry C.; Hays, Steven W.; and Carbon, Susan J. Managing the State Courts. St. Paul: West Publishing Company, 1977.

Bowman, Forest J. "Constitutional Revision on a Shoestring in West Virginia," Judicature, 59 (June-July, 1975), pp. 29-33.

Bunn, Charles W. A Brief Survey of the Jurisdiction and Practice of the Courts of the United States. St. Paul, Minnesota: West Publishing Company, 1949.

Current, Richard N.; Williams, T. Harry; and Freidel, Frank. American History: A Survey (Volume 2: Since 1865). New York: Alfred A. Knopf, Inc., 1971.

Desmond, Charles S. "Current Problems of State Court Administration," The Columbia Law Review, 65 (April, 1965), pp. 561-569.

Doan, Rachel N. and Shapiro, Robert A. State Court Administrators: Qualifications and Responsibilities. Chicago: The American Judicature Society, 1976.

Doyle, Joe. "Comparing Court Productivity," Judicature, 61 (April, 1978), pp. 416-421.

Finley, Robert C. "Judicial Administration: What is This Thing Called Legal Reform?," The Columbia Law Review, 65 (April, 1965), pp. 569-573.

Footlick, Jerrold K. "How Will the Courts Be Managed?," Judicature, 60 (August-September, 1976), pp. 78-83.

Freeman, William and Kellum, Myrtis. Court Administrator and Deputy Court Administrator, 17th Judicial District, Broward County Courthouse, Fort Lauderdale, Florida. Interview, September 24, 1979.

Gallas, Edward. "The Profession of Court Management," Judicature, 51 (April, 1968), pp. 334-336.

Gallas, Geoff. "Court Reform: Has it Been Built on an Adequate Foundation?," Judicature, 63 (June-July, 1979), pp. 28-38.

Gallas, Geoff and Lampasi, Michael. "A Code of Ethics for Judicial Administrators," Judicature, 61 (February, 1978), pp. 311-317.

Gazell, James A. The Future of State Court Management. Port Washington, New York: Kennikat Press Corp., 1978.

Grau, Charles W. Judicial Rulemaking: Administration, Access and Accountability. Chicago: The American Judicature Society, 1978.

Korbakes, Chris A.; Alfini, James T.; and Grau, Charles W. Judicial Rulemaking in the State Courts. Chicago: The American Judicature Society, 1978.

Merwin, Samuel. Law and the Legal System: An Introduction. Boston: Little, Brown and Company, 1973.

National Center for State Courts. Planning in State Courts: Trends and Developments, 1976-1978. Washington, D. C.: National Center for State Courts, 1978.

Pound, Roscoe. Organization of Courts. Boston: Little, Brown and Company, 1940.

Pound, Roscoe. "Principles and Outline of a Modern Unified Court Organization," Journal of the American Judicature Society, 23 (April, 1940), pp. 225-233.

Pound, Roscoe. "The Causes of Popular Dissatisfaction with the Administration of Justice," (pamphlet). Chicago: American Judicature Society, 1956.

Rosenbaum, Judith; Berkson, Larry; and Carbon, Susan J. "Implementing Court Unification: A Map for Reform," Duquesne Law Review, 2, pp. 419-471.

Sayre, Paul. The Life of Roscoe Pound. Iowa City: State University of Iowa Press, 1948.

Schulert, Barbara and Hoelzel, Bill. "Court Reform, the Unheralded Winner of the 1976 Elections," Judicature, 60 (January, 1977), pp. 281+.

Shapiro, I. S. "Managing the Judicial System: A Businessman's View," Journal of the American Bar Association, 64 (November, 1978), pp. 1672-1675.

The American University. Report of the Special Study Team on LEAA Support of the State Courts. By Dean John F. X. Irving, Judge Henry V. Pennington, and Dr. Peter Haynes. Washington, D.C.: 1975.

The Council of State Governments. Judicial Planning in the States. Lexington, Kentucky: 1976.

The Council of State Governments. State Court Systems: Revised 1976. Lexington, Kentucky: 1976.

The Council of State Governments. State Court Systems: Revised 1978. Lexington, Kentucky: 1978.

The Council of State Governments. The Book of the States, 1939-1940. Volume 3. Chicago: Council of State Governments, 1940.

The Council of State Governments. The Book of the States, 1976-1977. Volume 21. Chicago: Council of State Governments, 1977.

The Council of State Governments. The Book of the States, 1978-1979. Volume 22. Chicago: Council of State Governments, 1979.

"The Professionalization of Court Administration," Judicature, 50 (April, 1967), pp. 256-257.

U.S. Department of Justice. Court Unification: History, Politics and Implementation. By Larry Berkson and Susan Carbon with the assistance of Judy Rosenbaum. August, 1978.

U.S. Department of Justice. National Survey of Court Organization. Washington, D.C.: U.S. Government Printing Office, 1973.

U.S. Department of Justice. National Survey of Court Organization: 1975 Supplement to State Judicial Systems. Washington, D.C.: U.S. Government Printing Office, September, 1975.

Vanderbilt, Arthur T. Improving the Administration of Justice--Two Decades of Development. Cincinnati: University of Cincinnati Press, 1957.

Vanderbilt, Arthur T. (Ed.) Minimum Standards of Judicial Administration. New York: New York University Law Center, 1949.

Weinstein, Jack B. Reform of Court Rule-making Procedures. Columbus, Ohio: Ohio State University Press, 1977.

Weinstein, Jack B. and Zimmerman, Diane L. "Let the People Observe Their Courts," Judicature, 61 (October, 1977), pp. 156-165.

Wigdor, David. Roscoe Pound, Philosopher of Law. Westport, Connecticutt: Greenwood Press, 1974.

APPENDICES

APPENDIX A

COURT STRUCTURAL ORGANIZATION

Since the synonymity of the terms "court reform" and "court unification" has already been mentioned, it is appropriate to note from the outset that this appendix deals with the more precise meaning of the term unification, that is, the extent to which the structure of a state's court organization is simplified, unified, or consolidated. Because there are so many conflicting opinions about the extent to which a state's court system is or is not approaching the ideal organization, a concept which, itself, is subject to some controversy, the data are presented simply as incontestable fact first, that is, in terms of real numbers rather than representative numbers as some authors have chosen to do.[1] However, even the figures displayed can be misleading and they require additional explanation. For example, all states have at least one ultimate court of last resort and most are called either the supreme court or the court of appeals.[2] Some states provide for a division of appeals into either criminal or civil matters at the intermediate appellate level, however, one state actually provides for that division at the last resort level.[3] It is not at all uncommon for courts of general and original jurisdiction to hear appeals from courts of limited and special jurisdiction, however, I have listed all courts of original

and general jurisdiction under that heading and have chosen to ignore their appellate role in favor of their primary purpose. Where courts of limited or special jurisdiction are concerned, it would be possible to go into far greater detail as to their organizations and purposes but for this study, the principal significance of their existence rests with their number. Som scholars choose to discriminate between these courts based on their purposes and the situations which promoted their creation so as to argue that some of them are essential and outside the scope of the ideal of court unifcation.[4] I disagree with this interpretation; while I do appreciate the peculiarities that gave rise to, for example, the Civil and Criminal Courts of New York City, it is my opinion that these courts are just as susceptible to consolidation into a single court system as any others that have been so incorporated although I will acknowledge the probable greater enormity of such an effort. It seems to me, however, that those who argue for special consideration in such cases are resisting change for the sake of convenience rather than legitimately defending or justifying an exception to what has become a generally accepted concept of simplified court structure. For this reason, then, I have only totalled the numbers of courts in this category.

The last two colums of Table 1 require considerably more explanation because, unlike the first three, they in-

volve subjective evaluations. In the first, I have employed a simple nominal scale of yes or no. Although I anticipate disagreement with this standard of evaluation, for the purpose of this table only, a state's court system will be considered "unified" if the lowest court is subject to the immediate, even if indirect, supervision of the highest court of the state by virtue of the organizational structure of the state's legal system. The system will not be considered unified, for example, if subordinate courts (courts of limited or special jurisdiction) are functions of local (city or county) governments. Since this may be interpreted to reflect other elements of court unification, it may be appropriate to note those things which are not considered in this evaluation. First, because it seems to be in vogue, the fact that a state's constitution or a legislative act states that the court system will be unified is not, in and of itself, a basis for a determination that it is unified. Secondly, despite the validity of an argument that a determination of unification cannot be separated from such clearly defined standards as centralized management, centralized rule making, or centralized budgeting/financing, the presence or absence of any or all of these elements is not considered in this determination. In short, this is an evaluation of the structure of the courts only and, as such, is deliberately made with respect to only this one standard. It is defined as a standard in this table for two reasons. First,

since subsequent tables are designed to evaluate the other principal elements of court reform as discussed in Chapter II, it is appropriate to attempt an evaluation of this one area irrespective of the other two. Secondly, it is desirable to introduce a weight factor whereby greater differentiation can be made between those states that have a unified system (with respect to this standard only) and those that do not.

The final column of this table is designed to create a comparative scale of progress with regard to court unification at the ordinal level. In order to do this, I have assigned values to the data in the preceding columns as follows. With respect to courts of appeal, since it is generally accepted that no more than one court of last resort and one intermediate appellate court is required,[5] the presence of a single court results in an award of five points. Each additional court results in the subtraction of two points, however no state is given a score less than zero in this column. In the second column, the same numerical standard is applied. Since it is generally accepted that there may be two courts of original general jurisdiction while maintaining a simplified system,[6] a total of five points is awarded if there is one such court, three points if there are two and two points are subtracted for each additional court with no state achieving less than a score of zero. In the third column, a total of ten points is possible. If the state has only one court of original

jurisdiction, a score of ten was awarded; if it has only one court of limited or special jurisdiction. For each such additional court of limited or special jurisdiction, one point was deducted with no score less than zero being recorded. If the state has two or more courts of original general jurisdiction, all courts of limited or special jurisdiction were subtracted from the possible high of ten points. Finally, if a state has three or less courts, regardless of where they are placed, the state was awarded the maximum total of twenty points. It should be clear that this evaluation is based on the standard that there may be two courts of original general jurisdiction or one court of original general jurisdiction and one court of limited jurisdiction within the generally accepted framework of a simplified state court system.[7]

Finally, column five is designed as an overall indicator of the progress of each state. The method of point manipulation is arbitrary but, as stated earlier in Chapter 2, is designed simply to provide something of an ordinal scale. In order to do so, there were six mathematical possibilities for each state based on the results of the first four columns. The scores, in column five, of all states determined to have unified court systems as defined earlier (i.e., a yes response in column four) were computed as follows: those states with eighteen or more points were awarded five bonus points; those states with at least thir-

teen points but less than eighteen points were awarded three bonus points; and those states with at least nine points and less than thirteen points were awarded one bonus point. The scores of states with less than nine points remained the total of the first three columns. For those states determined not to have unified court systems, two bonus points were added for any state with seventeen points or more in the first three columns. All other states remained the total of the first three columns. There were four principal sources of the data reflected in Table 1. The U.S. Department of Justice; Law Enforcement Assistance Administration's National Survey of Court Organization, cited in earlier chapters, was published in 1973 and, therefore, while totally accurate in a larger number of cases, lacked a significant amount of information with regard to court reform developments in the various states for the last six years. Another, more current, source of data was the Council of State Governments' revised State Court Systems (1978) which provided an immediate indicator of the currency of the first source. However, the third source of data was the various state constitutions and appropriate statutes which were in fact researched first and against which all other sources were verified. Finally, the comparative tables found in Appendix A to the National Institute of Law Enforcement and Criminal Justice Court Unification: History, Politics, and Implementation as well as the narrative portion of that appendix

served as a basis for my development of comparative values of progress in court unification.

Table 1

State	Number of Courts of Appeal	Number of Courts of General Jurisdiction	Number of Courts of Limited/Special Jurisdiction	Is state court system unified?	Overall Rating
Alabama	3(1)	1(5)	3(8)	no	14
Alaska	1(5)	1(5)	1(10)	yes	25
Arizona	2(3)	1(5)	2(9)	no	19
Arkansas	1(5)	2(3)	6(4)	no	12
California	2(3)	1(5)	2(9)	no	19
Colorado	2(3)	1(5)	5(6)	no	14
Connecticut	1(5)	1(5)	1(10)	yes	25
Delaware	1(5)	2(3)	5(5)	no	13
Florida	2(3)	1(5)	1(10)	yes	23
Georgia	2(3)	1(5)	7(4)	no	12
Hawaii	1(5)	1(5)	1(10)	yes	25
Idaho	1(5)	1(5)	1(10)	yes	25
Illinois	2(3)	1(5)	0(12)[a]	yes	25
Indiana	2(3)	3(1)	6(4)	no	8
Iowa	2(3)	1(5)	0(12)[b]	yes	25
Kansas	2(3)	1(5)	1(10)	yes	23
Kentucky	2(3)	1(5)	1(10)	yes	23
Louisiana	1(3)	1(5)	8(3)	no	11

Table 1 (Continued)

State	Number of Courts of Appeal	Number of Courts of General Jurisdiction	Number of Courts of Limited/Special Jurisdiction	Is state court system unified?	Overall Rating
Maine	1(5)	1(5)	3(8)	yes	23
Maryland	2(3)	2(3)	2(8)	yes	17
Massachusetts	2(3)	1(5)	6(5)	no	13
Michigan	2(3)	2(3)	4(6)	no	12
Minnesota	1(5)	1(5)	3(8)	no	20
Mississippi	1(5)	2(3)	4(6)	no	14
Missouri	2(3)	1(5)	4(7)	no	15
Montana	1(5)	1(5)	4(7)	no	19
Nebraska	1(5)	1(5)	4(7)	no	19
Nevada	1(5)	1(5)	2(9)	no	21
New Hampshire	1(5)	1(5)	3(8)	no	20
New Jersey	2(3)	2(3)	3(7)	no	13
New Mexico	2(3)	1(5)	4(7)	no	15
New York	2(3)	1(5)	9(2)	no	11
North Carolina	2(3)	1(5)	1(10)	yes	23
North Dakota	1(5)	1(5)	4(7)	no	19
Ohio	2(3)	1(5)	3(8)	no	16
Oklahoma	3(1)	1(5)	1(10)	no	16

Table 1 (Continued)

State	Number of Courts of Appeal	Number of Courts of General Jurisdiction	Number of Courts of Limited/Special Jurisdiction	Is state court system unified?	Overall Rating
Oregon	2(3)	1(5)	5(6)	no	14
Pennsylvania	3(1)	1(5)	4(7)	no	13
Rhode Island	1(5)	1(5)	4(7)	no	19
South Carolina	1(5)	1(5)	5(6)	no	16
South Dakota	1(5)	1(5)	1(10)	yes	25
Tennessee	3(1)	4(0)	7(3)	no	4
Texas	3(1)	1(5)	10(1)	no	7
Utah	1(5)	1(5)	3(8)	yes	23
Vermont	1(5)	2(3)	1(9)	yes	20
Virginia	1(5)	1(5)	3(8)	yes	24
Washington	2(3)	1(5)	2(9)	no	19
West Virginia	1(5)	1(5)	2(9)	no	21
Wisconsin	1(5)	2(3)	1(9)	no	19
Wyoming	1(5)	1(5)	2(9)	no	21

[a]State awarded a total of twenty points for having three or less courts. See text.

[b]Ibid.

Endnotes

[1]For an example of such numerically equivalent displays of similar data, see Appendix A, LEAA, Court Unification: History, Politics and Implementation, by Larry Berkson and Susan Carbon with the assistance of Judy Rosenbaum, August, 1978, pp. 209, 212, and 214.

[2]A unique exception is New York in which the court of last resort is the New York Court of Appeals and the court of general jurisdiction is known as the Supreme Court.

[3]Oklahoma has a Supreme Court, a Court of Criminal Appeals, and a Court of (Civil) Appeals. The Court of Criminal Appeals is, for all intents and purposes, the court of last resort for criminal matters, whereas appeals heard by the Court of (Civil) Appeals may subsequently be heard by the Supreme Court.

[4]Department of Justice, Court Unification, Op. cit., Appendix A, p. 208 (at footnote 7). The authors note, but do not argue, that those states with high density population centers create courts that states without such population centers do not need and that when comparing the progress of these states and specifically, when assigning some sort of numerical values for comparison, consideration might be given to these peculiar needs.

[5]Ibid., p. 208.

[6]Ibid.

[7]Ibid.

APPENDIX B

CENTRALIZED COURT ADMINISTRATION

Inasmuch as administration requires administrators, it is a basic premise of this appendix that an evaluation of the progress made in the centralization of a state's court administrative functions can be reasonably accurate if determined from the progress made in the establishment and organization of the structure of court administrators. For this reason, the data in Table 2 are predominately concerned with court administrators.

The first element of data reflected in Table 2 is the year that the state created the position of court administrator or equivalent.[1] These data are not weighted but displayed simply to support information contained in the text.[2] The second element of data is somewhat more significant. It reflects a measurement of the degree of effort required to create the position of court administrator, but like some other scale I have created, it could be subject to some criticism. There are basically three ways in which the position of court administrator has been created in each of the 50 states. The first way is that the Chief Justice or other body responsible for the administrative functions of the courts simply creates the position by declaration or rule. This is, in my estimation, the easiest and simplest way to do it, although I do not mean to imply that it was

easy in every case. The ease with which a Justice or other body could create such a position is directly proportionate to the extent to which that officer or body controls his (its) own budget or, more precisely, the extent to which outside (probably legislative) interests are involved in the details of the judicial budget. Thus, for example, one might envision the Chief Justice who merely submits total budget requirements to his state's legislature for appropriation, having to do little in the way of explaining or justifying an increase in personnel costs for a new position. While this tends to oversimplify the process somewhat, the reader should see the difference between this method and the others shortly. For the purpose of this table, however, if the position of state court administrator was created by judicial declaration, rule or order, a one (1) appears in this column.

The second major way in which the position of court administrator may be created is by an act of the state legislature. One should immediately appreciate the difference between this method and the first one discussed. Suffice it to say that there are far more people involved in this process and it is far more time-consuming. Thus, based on the comparative effort alone, states which followed this procedure have been awarded a two (2) in this column.

The third and final method of creating the office of a state court administrator is by amending the state's con-

stitution. This process involves not only the judicial and legislative branches, but usually the people of the state as well. It is by far the most complex and time-consuming of the three methods and thus, I have awarded three points to those states that have created the position of court administrator through constitutional amendment.[3] In short, then, this column might be said to reflect not only the degree of difficulty of creating the position but the extent of the conviction of those who initiated it that it was necessary and that its necessity could be demonstrated.

The next standard of measurement applied to the evaluation of progress made by states in the centralization of the judicial administrative function measures the extent to which state court administrators supervise trial court administration either directly or through subordinate court administrators and whether or not these state court administrators are involved in any of four selected activities generally accepted as being within the purview of this office.[4] There are a total of eight points possible in this column. One point was awarded for each of the following functions: if a state court administrator had the authority to: (1) require trial courts to submit budget and accounting records to them; (2) establish personnel qualifications for auxillary personnel; (3) determine salaries of staff members when they were not otherwise fixed by law; and (4) approve requisitions. One point was awarded for each of the following

functions in which the state court administrator was involved: (1) research on court organization and functions; (2) dissemination on court operations; (3) long range planning; and (4) research assistance for the state court system.

Since I have chosen to include the function of judicial rulemaking under the heading of centralized administration and , more specifically, management, it is appropriate to include an evaluation of this element in this table.[5] A maximum of four points may be awarded each state based on the following criteria. If the highest court has sole rulemaking authority, two points were awarded. If the highest court shares that authority with the legislature, only one point was awarded and, if the court has no such role at all, zero points were assigned. Next, if the rules established by the highest court cannot be vetoed by the legislature, two points were awarded. If a two-thirds vote is required to veto, one point was assigned. No points were earned if the legislature or any other body could veto by simple majority. It is important to remember that the values in this and the preceding column are intended as indicators only for the purpose of comparison. Should the reader be interested in the specific data from which these values are derived, the cited sources are reasonably specific.

Finally, the last column is simply a total of the figures found in the preceding columns. The intent is again

to provide some level of discrimination between the various states for the purpose of comparison. And again, it is appropriate to remind the reader that these are non-linear values and that they do not constitute all of the possible measurements that could be taken. While unlikely, it is not impossible that a measurement of other factors might even change these relative standings considerably. Nevertheless, I have chosen standards generally accepted as valid by other researchers and consider them reasonably valid for the purpose of this work.

In addition to the sources already cited from which data were directly extracted, a good deal of the information found in this table was researched from the Council of State Governments' The Book of the States, 1978-1979 (Lexington, Kentucky) and Rachel N. Doan and Robert A. Shapiro, State Court Administrators, (Chicago: American Judicature Society, 1976).

Table 2

State	Date of Creation of State Court Administrator Position	How Created	Role and Functions of State Court Administrator	Rulemaking Authority of Highest Court	Totals
Alabama	1971	2	6	3	11
Alaska	1959	3	8	3	14
Arizona	1960	3	0	4	7
Arkansas	1965	2	4	4	10
California	1960	3	4	0	7
Colorado	1959	3	8	4	15
Connecticut	1965	2	4	2	8
Delaware	1971	2	3	4	9
Florida	1972	1	4	3	8
Georgia	1973	2	3	0	5
Hawaii	1959	2	8	4	14
Idaho	1967	2	6	4	12
Illinois	1959	3	5	2	10
Indiana	1968	2[a]	1	4	7
Iowa	1971	2	4	2	8
Kansas	1965	2	4	2	8
Kentucky	1976	2	4	4	10
Louisiana	1954	3	3	2	8

Table 2 (Continued)

State	Date of Creation of State Court Administrator Position	How Created	Role and Functions of State Court Administrator	Rulemaking Authority of Highest Court	Totals
Maine	1975	2	8	4	14
Maryland	1955	2	4	2	8
Massachusetts	1956	2	5	4	11
Michigan	1952	3	6	4	13
Minnesota	1963	2	3	1	6
Mississippi	1974	1	1	1	3
Missouri	1970	3	4	1	8
Montana	1975	1	3	2	6
Nebraska	1972	3	6	2	11
Nevada	1971	1	1	1	3
New Hampshire	1977	1	2	4	7
New Jersey	1948	3	7	4	14
New Mexico	1959	2	7	4	13
New York	1978	3	6	0	9
North Carolina	1965	2	6	1	9
North Dakota	1971	3	4	4	11
Ohio	1955	3	3	2	8
Oklahoma	1967	3	5	4	12

Table 2 (Continued)

State	Date of Creation of State Court Administrator	How Created	Role and Functions of State Court Administrator	Rulemaking Authority of Highest Court	Totals
Oregon	1971	2	4	0	6
Pennsylvania	1968	3	6	4	13
Rhode Island	1969	2	7	4	13
South Carolina	1973	3	4	2	9
South Dakota	1974	1	7	2	10
Tennessee	1963	2	3	1	6
Texas	1977	2	3	2	7
Utah	1973	2	4	4	10
Vermont	1967	2	8	2	12
Virginia	1952	2	5	0	7
Washington	1957	2	5	4	11
West Virginia	1945	2	5	4	11
Wisconsin	1962	2	4	1	7
Wyoming	1974	1	2	4	7

[a]Indiana created its first equivalent of a court administrator by rule of the Indiana Supreme Court in 1968. In 1975, the Indiana Code was changed to create another office, more in line with that of a state court administrator entitled Executive Director, Division of State Court Administration. Reference Indiana Supreme Court Rule 12 (1968)

and Indiana Code 1971 33-2.1-7-1 (as amended) as cited in The Council of State Governments, The Book of the States, (Chicago: Council of State Governments, 1979), p. 101.

Endnotes

[1]While the term "court administrator" has come to be accepted as one defining the administrative head of the court system as differentiated from the chief justice or legal head, some states, perhaps for reasons of originality, call their administrative heads something else. In Virginia, the head administrator is called the Executive Secretary to the Supreme Court and in Louisiana, ostensibly the same position is called the Judicial Administrator. Regardless of the title assigned, they are for all practical purposes, court administrators and are so called in this study.

[2]See Chapter II.

[3]I accept the validity of an argument which claims that the effort would have been somewhat less if an effort to amend the state constitution were not based on the need to reorganize the judiciary or that this particular creation was simply a "rider". I maintain, however, that the difficulty of making this an element of the constitution in any case must necessarily have been greater than that required by either of the other two methods. Additionally, there is a valid argument that some states' constitutions are significantly general enough to permit the totally legitimate creation of such an office without necessitating a constitutional change. That this is true, however, does not preclude a measurement of the effort made to establish the position even though no greater effort was required.

[4]U.S. Department of Justice, Court Unification: History, Politics, and Implementation, by Larry C. Berkson and Susan J. Carbon, with the assistance of Judy Rosenbaum, August, 1978, p. 210.
The criteria and points awarded in this category of evaluation are extracted directly from Table A-2 of the referenced document, p. 212.

[5]Ibid., Table A-3, page 214. I borrowed the form of evaluation for this element from Table A-3 and assigned points differently. The data reflected in the column are derived from both that source and Chris A. Korbakes, et al., Judicial Rulemaking in the State Courts, (Chicago: American Judicature Society, 1978).

APPENDIX C

FISCAL CONSOLIDATION

The greatest difficulty in regard to comparing the progress made by the various states in consolidating or otherwise modernizing their courts' fiscal functions is in obtaining current data. The fact is that the data reflected in the subsequent table are, for the most part, accurate only as of 1975 and some elements are even older. Another equally significant problem arises when one attempts to determine actual figures in regard to judicial financial matters since so many states consolidate these fiscal details under one heading of, for example, law enforcement, or other general category. Given these rather significant limits, then, I present the data which follows with qualification and, in view of that qualification, have accorded it lesser value as an indicator of court progress in subsequent evaluations.

If the ideal of financial consolidation entails the concept that the judiciary should be responsible for preparation of its own budget, then a measurement of the extent to which it is constitutes a valid indicator of the progress made toward the ideal. In column one of Table 3, I have displayed a figure for each state which indicates the extent to which the judiciary participates in the preparation of the budget for that branch of government. If the state

court administrator's office is responsible for the collection of feeder requests from subordinate elements and submission of a consolidated judicial budget, the state was awarded three points. 'If the state court administrator or other designated judicial branch personnel assemble the data but submit it to another branch for budget preparation, I awarded the state two points. If state level judicial personnel are not involved in the budget process at all (i.e., if external elements both collect the data and prepare the budget), I awarded the state one point. For the data displayed in this column, I relied exclusively on that provided by Carl Baar in Separate But Subservient, Court Budgeting in the American States,[1] with the exception that where his data had been updated for inclusion in the Law Enforcement Assistance Administration's 1978 report,[2] I used the more recent data.

Since the extent to which the judiciary is independent of the executive in budgetary matters and whether the budget is transmitted directly to the legislature can be considered a measure of the fiscal efficiency of the judicial branch, I have displayed an indication of that status for each state in the second column of the table. Each state could have been awarded a maximum of five points. One point was awarded, if the budget for the judiciary, regardless of where it is prepared, is submitted to an executive agency for approval. Two points were awarded, if the budget

is submitted directly to the state legislature. In addition to the points based on budget channel submission, an additional three points were awarded, if the executive branch is totally excluded from the judiciary's budgeting process. If the executive branch has the right of review but cannot revise the judicial budget, two points were awarded. If the executive can review and revise any element or all of the judicial budget, only one point was awarded. Again, the data displayed were obtained from Baar's work, as modified by more current information in the LEAA report.[3]

Finally, as a measure of the extent to which the state (ostensibly, the state court administrator's office) manages the financial affairs of the court system, the third column of the table indicates the percentage of judicial expenditures derived from state funds. If 10 percent or less comes from state funds, the state is awarded one point. A maximum of ten points is possible, if 100 percent of judicial expenditures are derived from state funds. All percentages are rounded off to the nearest 10 percent.[4]

The fourth column simply totals the preceding three and that number is used for the final computation in Appendix D.

Table 3

State	Extent of Judicial Involvement in Budget Preparation	Extent of Executive Involvement in Judicial Budget	Extent of State Funding of Judicial Expenditures	Total
Alabama	1	2	3	6
Alaska	3	2	10	15
Arizona	2	3	1	6
Arkansas	1	3	3	7
California	1	2	1	4
Colorado	3	4	7	14
Connecticut	3	2	10	15
Delaware	2	3	8	13
Florida	1	2	2	5
Georgia	1	3	2	6
Hawaii	3	5	10	18
Idaho	2	2	6	10
Illinois	2	2	3	7
Indiana	1	2	2	5
Iowa	1	4	3	8
Kansas	2	3	3	8
Kentucky	1	2	5	8
Louisiana	1	4	2	7

Table 3 (Continued)

State	Extent of Judicial Involvement in Budget Preparation	Extent of Executive Involvement in Judicial Budget	Extent of State Funding of Judicial Expenditures	Total
Maine	1	2	6	9
Maryland	2	2	6	10
Massachusetts	1	2	2	5
Michigan	2	2	2	6
Minnesota	3	2	2	7
Mississippi	1	2	4	7
Missouri	1	2	3	6
Montana	1	2	3	6
Nebraska	1	3	3	7
Nevada	1	5	3	9
New Hampshire	1	2	3	6
New Jersey	3	2	2	7
New Mexico	3	2	9	14
New York	1	3	2	6
North Carolina	3	2	9	14
North Dakota	1	5	3	9
Ohio	2	4	1	7
Oklahoma	2	2	5	9

Table 3 (Continued)

State	Extent of Judicial Involvement in Budget Preparation	Extent of Executive Involvement in Judicial Budget	Extent of State Funding of Judicial Expenditures	Total
Oregon	2	4	3	9
Pennsylvania	1	2	3	6
Rhode Island	3	3	10	16
South Carolina	2	2	1	5
South Dakota	1	2	3	6
Tennessee	3	2	2	7
Texas	1	2	2	5
Utah	1	2	5	8
Vermont	3	2	9	14
Virginia	3	2	5	10
Washington	1	2	2	5
West Virginia	1	4	4	9
Wisconsin	1	4	3	8
Wyoming	1	2	4	7

Endnotes

[1]Carl Baar, Separate But Subservient: Court Budgeting in the American States, (Lexington, Kentucky: D. C. Heath and Company, 1975), pp. 13-14.

[2]U.S. Department of Justice, Court Unification: History, Politics, and Implementation, by Larry C. Berkson and Susan J. Carbon, with the assistance of Judy Rosenbaum, August, 1978, p. 212.

[3]Baar, Op. cit. and U.S. Department of Justice, Op. cit.

[4]Baar, Op. cit., pp. 116-117.

APPENDIX D

SUMMARY

This appendix is intended simply as a summary indication of the comparative standings of the states with regard to the progress made in court reform. As an aid to the reader, I have placed each of the states into a quartile for each of the three areas of court reform that has been discussed in the text and numerically evaluated in the preceding appendices. Although the mathematics are not exact, the simple comparison of progress possible is all that it is intended to be.

Table 4

Rank	State	Structural Unification	Administrative Unification	Fiscal Unification	Totals
1	Hawaii	1	1	1	56
2	Alaska	1	1	1	54
3	Connecticut	1	3	1	48
3	Rhode Island	2	1	1	48
5	Idaho	1	1	1	47
6	Florida	1	3	4	46
6	Maine	1	1	2	46
6	North Carolina	1	2	1	46
6	Vermont	2	1	1	46
10	Colorado	3	1	1	43
11	Illinois	1	2	3	42
11	New Mexico	3	1	1	42
13	Iowa	1	3	2	41
13	Kentucky	1	2	2	41
13	South Dakota	1	2	4	41
13	Utah	1	2	2	41
13	Virginia	1	3	1	41
13	West Virginia	2	2	2	41
19	Kansas	1	3	2	39

Table 4 (Continued)

Rank	State	Structural Unification	Administrative Unification	Fiscal Unification	Totals
19	North Dakota	2	2	2	39
21	Nebraska	2	2	3	37
21	Oklahoma	3	1	2	37
23	Delaware	3	2	1	35
23	Maryland	3	3	1	35
23	Washington	2	2	4	35
23	Wyoming	2	3	3	35
27	New Jersey	3	1	3	34
27	Wisconsin	2	3	2	34
29	Minnesota	2	4	3	33
29	Nevada	2	4	2	33
29	New Hampshire	2	3	4	33
32	Arizona	2	3	4	32
32	Pennsylvania	3	1	4	32
34	Alabama	3	2	4	31
34	Michigan	4	1	4	31
34	Montana	2	4	4	31
34	Ohio	3	3	3	31
38	California	2	3	3	30

Table 4 (Continued)

Rank	State	Structural Unification	Administrative Unification	Fiscal Unification	Totals
38	South Carolina	3	2	4	30
40	Arkansas	4	2	3	29
40	Massachusetts	3	2	4	29
40	Missouri	3	3	4	29
40	Oregon	3	4	2	29
44	Louisiana	4	3	3	26
45	Mississippi	3	4	3	24
45	New York	4	2	4	24
47	Georgia	4	4	4	23
48	Indiana	4	3	4	20
49	Texas[a]	4	3	4	19
50	Tennessee	4	4	4	17

[a]The State of Texas recently adopted some reform changes which have not been incorporated into this thesis.