1975

Court Reform in New York State: An Overview for 1975

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COURT REFORM IN NEW YORK STATE: AN OVERVIEW FOR 1975

By David J. Ellis*

I. INTRODUCTION

In the novel One Just Man, by James Mills, the hero, a 45 year old legal aid attorney, starts advising his clients to refuse to plea bargain. The idea spreads, and the strain on the prisons brings the total collapse of the New York City criminal justice system.

I can only hope that Mr. Mills’ grim message will not be dismissed as alarmist exaggeration, because his basic premise is quite sound; our criminal justice “system” is in such a fragile state that even a relatively small increase in the number of defendants exercising their constitutional right to a speedy trial could well bring it tumbling down, especially in a time of great economic instability. It is even more alarming that, despite some impressive recent improvements in judicial administration and productivity, things seems to be getting worse. The backlog of undisposed felony cases in New York City increased by an ominous 20.2 percent during 1974, in spite of a more than 6 percent drop in the number of indictments during that same period.¹ And when one considers that there were about five times as many felony arrests as there were felony indictments,² it is clear that large-scale administrative plea bargaining was required to achieve even this dismal result.

Depressing as these statistics are, they reflect but a small part of a vast problem. Although the most dramatic failures of our system are associated with its ineffective, and often inhumane and unjust, efforts to “control” crime, serious deficiencies on the civil side magnify the considerable inherent difficulty of administering justice according to law. Given this sad reality, it is not surprising that public confidence in our system of law enforcement continues to decline.³

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¹. N.Y. Times, Feb. 12, 1975, at 1, col. 5. The number of untried felony cases in the city rose from 10,621 on December 31, 1973 to 12,335 on December 31, 1974 while the number of indictments fell from 22,983 in 1973 to 20,669 in 1974.

². N.Y. Times, Feb. 11, 1975, at 1, col. 4. There were 101,748 felony arrests in New York City in 1974.

³. According to the Harris poll (Harris Survey, Public Confidence in Law Enforce-
Considering the importance our society attaches to justice, one might expect an outraged citizenry to have been up in arms long ago over our bleak plight. But our experience has been otherwise. Most people do not seem to take the threat too seriously. Although generations of doom-forecasting court reformers have filled our libraries with dire predictions and detailed roadmaps to the promised land of speedy and equal justice, our society has neither collapsed, nor been able to deal with this age-old problem. As Roscoe Pound observed in 1906:

Dissatisfaction with the administration of justice is as old as law. Not to go outside our own legal system, discontent has an ancient and unbroken pedigree. The Anglo-Saxon laws continually direct that justice is to be done equally to rich and to poor, and the king exhorts that the peace be kept better than has been wont, and that “men of every order readily submit *** each to the law which is appropriate to him.” The author of the apocryphal Mirror of Justices gives a list of one hundred and fifty-five abuses in legal administration, and names it as one of the chief abuses of the degenerate times in which he lived that executions of judges for corrupt or illegal decisions had ceased. Wyclif complains that “lawyers make process by subtlety and cavilations of law civil, that is much heathen men’s law, and do not accept the form of the gospel, as if the gospel were not so good as pagan’s law.” Starkey, in the reign of Henry VIII, says: “Everyone that can color reason maketh a stop to the best law that is beforetime devised.” James I reminded his judges that “the law was founded upon reason, and that he and others had reason as well as the judges.” In the eighteenth century, it was complained that the bench was occupied by “legal monks, utterly ignorant of human nature and of the affairs of men.” In the nineteenth century the vehement criticism of the period of the reform movement needs to be mentioned. In other words, as long as there have been laws and lawyers, conscientious and well-meaning men have believed that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice. But we must not be deceived by this innocuous and inevitable discontent with all law into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today.

*ment Has Declined, News Release, Oct. 22, 1973), only 18 percent of the American public had confidence in our law enforcement system in 1974; a sharp drop from the previous low of 24 percent who had confidence in 1973.

Certainly nothing that has happened since Dean Pound’s time would make his conclusions any less valid today than they were when made sixty-nine years ago. There is still widespread dissatisfaction with the administration of justice, accompanied, as it was then, by disagreement as to what is wrong and what needs to be done.

But the situation today is far different from what it was at the turn of the century or in the reign of Henry VIII. The dissatisfactions caused by traditional problems such as delay, unnecessary complexity and inadequacy of some judicial personnel have been magnified enormously by vastly increased caseloads. Our rapidly changing society continues to spawn new kinds of problems at an ever-increasing rate.

Writing ten years ago, Professor Harry W. Jones explained the origins and possible consequences of what he called “a crisis in judicial administration”:

Our courts are now confronted by the mid-century law explosion. This, to some extent, is a function of the population explosion—twice as many people, therefore twice as many disputes to be settled, twice as many civil claims to be heard and weighed, twice as many criminal charges to be tried and determined. But that is by no means the whole story of the law explosion; the full truth is that we have a society that is far more complex and vastly more demanding on law and legal institutions. New rights, like those of social security, have been brought into being, and older rights of contract and property made subject to government regulation and legal control. New social interests are pressing for recognition in the courts. Groups long inarticulate have found legal spokesmen and are asserting grievances long unheard. Each of these developments has brought its additional grist to the mills of justice.

Whatever the causes, the consequences for the legal order are manifest. The great mass of criminal cases, divorce proceedings, and adjudications in matters of mental illness, alcoholism, narcotics addiction, and juvenile delinquency are disposed of in any major city on an assembly-line basis, so many cases to the hour. What are the implications for law and social order when untold thousands of people charged with criminal offenses are handled in the lower courts as if they were mere blanks for processing?

Can justice be administered on a mass-production basis? Are there no middle ways between the glacial slowness of the court process in personal injury suits and the frantic speed of the magistrates’ courts in misdemeanor cases? So far we have made only a little progress in recasting our judicial institutions to meet the quantitative burdens imposed on them by the law explosion. There are widening discrepancies between the formal law in the books and the law in action in the courts. These are not cracks to be painted over but faults that imperil the structure of American justice. We are going to have to be searching and candid in our appraisal of existing judicial procedures and boldly imaginative in reconstructing traditional institutions to meet the challenges of our own time.

Today our courts face ever increasing burdens as new groups of people, such as indigent criminal defendants and offenders, consumers and those trying to protect the environment, gain access to them.

Our judicial institutions thus face an unprecedented challenge. Huge and growing caseloads force courts to emphasize productivity, often at the cost of justice in individual cases. As the volume and pressure mounts, so does the threat that increasing productivity will replace the doing of justice as the principal goal of our system, if it has not done so already.

In my view, the purpose of court reform in 1975 is not the same as it has been in the past. As always, we must try to make our judicial process as speedy, efficient and just as possible, but today we must do more. We can no longer afford, if we ever could, the luxury of burdening our judicial system with problems neither it nor anyone else can solve, and then blaming the system for failing. We must agree on realistic objectives, and give the courts the resources to accomplish them. Wherever possible other means must be found to resolve problems. The purpose of court reform in 1975 must be to enable our judicial institutions to deal as justly and expeditiously as possible with problems which can be dealt with by the judicial system and cannot better be dealt with elsewhere.

While there is no general consensus as to what is wrong or what needs to be done, there is some agreement as to which parts of the system need the most attention. I will focus on two of the areas in which the problems seem to me to be the most grave: the quality of our judges, and the structure, administration and financing of our court system.

Although beyond the scope of this article, the criminal jus-
The practice system is a third major area which must be mentioned briefly. The problem in this area cannot be solved merely by improving and expanding the system. An entirely new approach is called for. If we want our criminal justice system to be at all effective, we must substantially reduce the number of cases brought into it, so that each case that is brought can be dealt with on its merits.

The best way to reduce the number of cases brought into criminal courts would be to reduce crime. I do not think this can be done without a radical change in our social and economic institutions, and in any case, it will take a long time. The best we can do is to make sure that our courts get only those cases which can be dealt with in no other way. We must prohibit an activity only when there is a compelling social need to require compliance with a particular norm. We cannot afford the luxury of prohibiting activities which offend the moral sensitivities of the majority but do not threaten anyone's rights, safety or well-being. We cannot waste the limited resources of our criminal justice system by enforcing laws against victimless crimes such as gambling, obscenity, prostitution, possession of drugs, and staying open on Sunday (a criminal offense in New York). We must tolerate a wide range of behavior and accept the fact that other people's values differ from ours.

With this in mind, I will attempt in the balance of this article to provide an overview of the nature of the two important problems confronting the New York State court system alluded to earlier and the solutions which have been proposed to solve them.

II. Politics and Court Reform

In discussing court reform in New York State, it is tempting to start by comparing conditions in New York State with an established set of standards, such as the Standards Relating to

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6. There are severe limits on what can be done to increase the number of cases our courts can try, whether by increasing efficiency or expanding the number of courts. In 1974, there were 101,748 felony arrests, (see Association of Judges of the Criminal Court of the City of New York, infra note 91, at 1) and 1,778 felony trials in New York City, (see Office of Court Administration, Supreme Court (Criminal Branch): Statistical Summaries and Comparisons for New York City, February Term 1975, at 4, figure 2 (Mar. 24, 1975)). Even if last year we had had twice the number of courts we actually had, working twice as efficiently as they actually did, less than 7 percent of all persons arrested for felonies in 1974 could have been brought to trial. Such a system can hardly deter crime.

7. See p. 666 supra.
Court Organization drafted by the American Bar Association Commission on Standards of Judicial Administration [hereinafter A.B.A. standards]. But while this approach is useful with some subjects, and has the advantage of providing a comprehensive and respected point of reference, it has the disadvantage with respect to some questions of overemphasizing standards which may have little relevance to court reform in New York State, since major issues concerning court reform here are often political, not academic. Before turning to specific issues, therefore, I would like to make a few personal observations about New York politics.

First, politically, New York State is divided into two parts: New York City, where Democrats usually win, and the rest of the state, where, except for a few isolated urban areas, Republicans usually win. This gives New York City Democratic leaders and upstate Republican leaders at least one thing in common: they dispense a lot of political patronage.

Second, ethnic considerations often figure heavily in political decisions.

Finally, in attempting to deal with the problems of our courts, most politicians follow rather than lead a constituency which is basically conservative in these matters.

III. THE QUALITY OF OUR JUDGES

Although it is our proud boast that we are a nation of laws and not of men, our laws can never be much better than the people who apply them. As Justice Cardozo said, “In the long run, there is no guarantee of justice except the personality of the judge.”

Unfortunately, while the need to have the best judges possible seems obvious, there is substantial disagreement as to how to get and keep good judges. There is also a continuing argument as to how to improve the performance of or get rid of bad judges.

A. Judicial Selection.

The state constitution prescribes the methods for selecting

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8. In the present legislature, New York City is represented by 77 Democratic legislators and 15 Republicans.
9. The rest of the state is represented by 80 Republicans and 38 Democrats, 19 of whom represent urban areas.
judges in New York. This means that any change requires a constitutional amendment, a long and difficult procedure involving passage of the proposed amendment by two successively elected legislatures and then approval of the voters by referendum.

Most judges are elected in partisan elections. These include judges of the court of appeals, supreme court, county courts, surrogate's courts, family court (outside of New York City), civil court (in New York City), district court and justice of the peace. A few judges are appointed. The governor appoints court of claims judges with the advice and consent of the senate, designates appellate division justices (from among elected supreme court justices), and fills vacancies on supreme court and certain other courts by interim appointment (interim appointees must subsequently run for election). The mayor of New York City appoints family and criminal court judges within the city.¹¹

The constitutional structure, however, is misleading. In most instances, judges run cross-endorsed and unopposed¹² and the election is a mere rubber-stamping of the choice made by the leader of the dominant political party in the county. While this method does not preclude the possibility of getting good judges, (and New York has produced its Cardozos) it facilitates and encourages the selection of judges primarily for political reasons. A candidate's qualifications for judicial office, though not totally irrelevant under this system, are certainly not the principal criteria for selection. Often the result has been the election of judges with no noticeable qualifications for office, who, not surprisingly, turn out to be bad judges.

Even in the few cases where an election is contested however, voters cannot make an informed choice because they do not and cannot know very much about a candidate's qualifications for office. The voter typically faces a long list of candidates unknown to him, who, in any case, are prevented by the Canons of Judicial Ethics from taking meaningful positions. Besides, the realities of political financing usually make it extremely difficult for judicial candidates to attract any voter attention.

The result has been that judges get elected in a climate of nearly total voter ignorance. Surveys conducted within a few days after the election have consistently shown that more than 90 per-

¹¹. N.Y. CONST. art. VI.
¹². According to an unpublished study conducted by the Fund for Modern Courts, more than 90 percent of the candidates for supreme court since 1969 ran without opposition.
cent of the voters were unable to recall the name of a single judge they had voted for.  

Another problem with the election of judges is that many of those most qualified to be judges are lost to the bench because they are not, and do not wish to become, involved in partisan politics.

Persistent abuses of the system, such as the alleged purchase of a Suffolk County supreme court judgeship for $50,000 in 1968, have weakened public confidence in the judiciary and made the election of judges a favorite target for court reformers since the turn of the century.

1. The Merit System

The solution most consistently and vigorously urged to remedy the failings of our elective system is to replace it with a merit selection system. It is the system recommended by both of the national commissions recently established to set minimum requirements for responsive and efficient courts, the A.B.A. Commission on Standards of Judicial Administration and the National Advisory Commission on Criminal Justice Standards and Goals [hereinafter N.A.C.].

Under the Merit Plan (also known as the Missouri Plan, because Missouri (in 1940) was the first state to adopt it), judges are appointed by an elected executive from lists of names submitted to him by broadly based, nonpartisan nominating commissions. Judges so appointed hold office for a minimum number of years, at which time their names are submitted to the voters for approval without opposition, the sole question being whether or not the judge shall be retained in office. Similar elections take place at the end of each term, unless the judge loses, retires or otherwise leaves office, in which case a vacancy exists which is filled by the same procedure. This post-appointment election is called "merit retention." Although most states using merit selection also employ some form of merit retention, not all reformers

think it is a good idea. The A.B.A. Commission makes it optional, and the N.A.C. takes no position on it.16

Before going any further, a distinction should be made between merit selection and other systems involving appointment of judges. Under merit selection, the appointing executive is obliged by law to make his choice only from the limited number of candidates recommended to him by a judicial nominating commission as best qualified. In other appointive systems, such as the New York court of claims and the federal judiciary, the executive's power to appoint is limited, if at all, only by minimal status requirements (such as citizenship or admission to the bar for a specified length of time) and/or confirmation by some legislative body. Backers of merit selection consider this difference crucial, since some of the most flagrantly political selections have been made under appointive systems with no safeguards.

Merit selection is supposed to cure the principal defects of the elective system. If the nominating commissions are properly chosen, political considerations are minimized. Selection is made by informed persons composing a professionally staffed, nonpartisan, broadly representative nominating commission. The commission establishes standards and evaluates the qualifications of potential candidates and is thus in a position to recommend to an elected, and therefore politically accountable, executive a limited number of those candidates it deems best qualified. The nonpolitical atmosphere presumably makes the process more attractive to qualified lawyers who have not fostered political connections.

Despite these supposed advantages, despite long-standing dissatisfaction with and abuses of the elective system, despite the long-time urgings of scholars and reformers in New York and throughout the country; and despite the recommendations of the A.B.A. Commission and the N.A.C., resistance to merit selection remains strong in New York. Some of the opposition is philosophical, some political, and some results from the confusion caused by the bewildering variety of merit plans which have been recently advanced.

Philosophical opposition is usually expressed in terms of "faith in democracy" or fear of "elitism" or "bar association poli-

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16. ABA Standards § 1.21 (b)(iii); National Advisory Committee on Criminal Justice Standards and Goals, Courts, Standard 7.1 (1973) [hereinafter cited as N.A.C. Standards].
tics” in the selection process. No matter how strong the evidence of the unsuitability or abuse of the elective system may be, some people will oppose any plan which takes away their right to vote. This point of view is often accompanied by the belief that merit selection would be just as political as election. Blatant political favoritism in nonmerit appointive systems is often misleadingly cited as proof of this latter belief.17

Although opposition to merit selection is usually expressed in terms of “democracy” (and the traditional American fondness for the elective process is a genuine concern of many people), this concern is often used to mask motives that are purely political. People outside of New York City who are satisfied with the elective process in their counties have little interest in changing the system just to solve problems in the Big Apple. Minority groups, who for the first time see the possibility of getting more than token representation on the bench, fear that the merit system would mean fewer minority judges. The county political leaders who now choose most judges are in no hurry to see the selection process taken from their hands. And legislators who would like to finish their careers in judicial robes have a vested interest in keeping things the way they are.

The task of political opponents of the merit plan is made considerably easier by the plethora of competing merit plans which have been advocated for New York. Seven major variations of the merit plan have received substantial support, minor variations have been advanced, and proposals have also been introduced to reform the present elective system by grafting one or more elements of the merit plan to it.

a. The Mayor’s Committee: The Problem of Unlimited Nominations

The first attempt at merit selection in New York was made by Mayor Robert F. Wagner in 1961, in fulfillment of a campaign pledge. He set up a 24-member Mayor’s Committee on the Judiciary to screen candidates for judgeships which the Mayor of New York fills by appointment (criminal court, family court and interim vacancies on civil court), and he agreed to appoint only candidates found “qualified.” This practice has been followed by his successors Mayors Lindsay and Beame. The mayor himself

appoints eleven of the twenty-four members of the Committee and the remaining thirteen are appointed by the presiding justices of the two appellate divisions in New York City (six individually and one jointly). Anyone may propose names for consideration. The Committee recommends an unlimited number of candidates to the mayor until he finds one he is satisfied with.18

Although this system has certainly kept totally unfit candidates from being named to the bench (while giving the mayor an excuse when pressured by party leaders to appoint unqualified candidates), it has not been entirely satisfactory. Political considerations continue to play a dominant role in the selection process and the best qualified candidates are not always the ones appointed; the mayor is not required to choose from a limited number of candidates, but can and does keep asking for names. For example, during the Lindsay administration, the Committee considered 750 candidates, found 62 "exceptionally well qualified" and 238 "qualified." Only 26 (42 percent) of those found "exceptionally well qualified" were appointed, while about 130 "qualified" judges were appointed ahead of the 36 other "exceptionally well qualified" candidates.19


In preparation for the constitutional convention of 1967, the Institute of Judicial Administration, at the request of the League of Women voters, the Committee for Modern Courts and the Citizens Union, prepared a Model Judiciary Article for the State of New York. This Model Article contained a "pure" merit plan for selecting judges, and represented the latest contemporary thinking on the subject. It would have established separate judicial nominating commissions on the state, New York City and supreme court district levels, to recommend three candidates for each vacancy to the governor, mayor of New York City or local county executive, depending upon the court. All judges of a merged court system would have been covered.20

The politically-dominated constitutional convention proposed a Judiciary Article which would have left the judicial selec-

19. Id. at 146.
20. INSTITUTE OF JUDICIAL ADMINISTRATION, A MODEL JUDICIARY ARTICLE FOR THE STATE OF NEW YORK.
tion system intact, and which would have made only minor changes elsewhere. However, it was opposed by most court reformers, and met a quiet death at the hands of the voters, along with the rest of the convention’s work.

c. The Dominick Commission Recommendations.

In 1970, the state legislature created a Temporary Commission on the New York State Court System to study and make recommendations concerning the state court system. State Senator D. Clinton Dominick was named chairman. In its report *And Justice for All* issued on January 2, 1973, the Commission found “too much that is wrong” with the state court system, and made 180 recommendations on how to improve it. The Commission was sharply divided on the question of selection, however, and consequently called for little change in the selection process. Its only recommendation with respect to merit selection was that, for judgeships already filled by appointment, the governor’s or mayor’s choice should be limited to candidates recommended by a judicial nominating committee. As the report put it:

Experience in other states has shown that the use of a committee composed of lawyers, laymen, and a judge to nominate a limited number of qualified persons for judicial vacancies, combined with the gubernatorial appointive power, has tempered the partisan political element in the appointive process. Unfortunately the Commission did not think the practice should be expanded. Concluding that “all elective and all appointive systems have virtues and flaws,” the Commission opted for maintaining the elective system where it now exists.

d. The Coalition Position—No Merit Retention.

In the spring of 1972, the Committee for Modern Courts, a citizens organization headed by John J. McCloy, and a Coalition of forty civic, social and professional organizations, formed an alliance to further the increasing citizen interest in court reform. Five working panels were established to develop consensus positions in various areas of reform, including one on judicial selec-

21. *TEMPORARY COMMISSION ON THE NEW YORK STATE COURT SYSTEM, . . . AND JUSTICE FOR ALL* (1973) [hereinafter cited as DOMINICK COMM’N REP].
24. Id. at 53.
tion, tenure and removal.

The panel on selection, tenure and removal of judges issued a report in April, 1973, calling for merit selection of all judges without merit retention. The panel recommended that twelve broadly based twelve-member Judicial Nominating Councils be established, one statewide Council and one Council for each of the state's eleven judicial districts. The non-partisan Councils, half laymen and half lawyers, would contain no more than six members of any single political party, and would recommend, by a two-thirds vote, four or more candidates for each vacancy. Instead of merit retention, the panel proposed that a new and effective system of judicial discipline, coupled with the political accountability of the appointing executive, would provide a check on the quality of judicial appointments.\(^\text{25}\)

The argument against merit retention is similar to the one against the elective system—the voters have no way of making an informed decision about the performance of a judge. Opponents of merit retention also claim that a retention election held shortly (usually one or two years) after a judge takes office both discourages qualified people from seeking judicial office (why give up a successful and profitable law practice if you may be voted out in a short time) and infringes upon the judicial independence necessary to the impartial administration of the law (judges might be inclined to make "popular" rather than proper decisions to ensure their retention).

The Coalition recommendations served as the basis for legislation introduced in the 1974 session of the legislature by Senator John Dunne and Assemblyman Franz Leichter.\(^\text{26}\) Prepared in cooperation with several of the Coalition members, including the Committee for Modern Courts, the New York State Bar Association, the League of Women Voters and the Citizens Union, the Dunne-Leichter proposal embodied all the principal elements of the Coalition recommendations and was enthusiastically supported by Coalition members. It died in committee, however, and did not succeed in its purpose of unifying the efforts for merit selection in New York State because new and powerful forces, with differing views on the problem, had entered upon the scene.


e. The Gordon Committee Proposals.

After the issuance of the Dominick Commission report in 1973, the legislature established a Joint Legislative Committee on Court Reorganization, chaired by State Senator Bernard G. Gordon, to study the entire question of court reorganization and make its own recommendations. After holding hearings throughout the state, Senator Gordon introduced his own proposal in 1974, which was that the election of judges to the court of appeals be ended and replaced by a system of non-merit appointment by the governor.27 This proposal, opposed by virtually all reform groups, passed the senate but died in the assembly, as did another similar Gordon proposal on gubernatorial appointment of the court of appeals, which would have permitted, but not required, the establishment of a judicial nominating commission to propose candidates to the governor.28

After holding additional hearings, Senator Gordon, who is also chairman of the senate judiciary committee, proposed a new selection system designed to deal with two of the principal objections to merit selection.29 The new proposal attempts to deal with the upstate-New York City conflict and the people's right-to-vote issue by permitting the voters in each judicial district (New York City voting as a unit) to decide by referendum whether they want to retain the elective system or switch to merit selection.30 Although this compromise approach does not fully satisfy merit supporters because it is thought to be likely to create a split in the "unified" court system along upstate-New York City lines, it may receive considerable support if it appears to be the only merit plan with any real chance of being passed.31

f. The Breitel Approach: Confirming Instead of Nominating Commissions

One of the reasons that interest in merit selection has grown in recent years is, ironically, the widely publicized races for election to the court of appeals in 1972, 1973 and 1974, the first such contests since 1916. In the 1972 race, the voters witnessed the

30. Id.
unusual agreement of all seven candidates for the state's highest court that such elections should be ended. The heavily financed, media-oriented campaign for chief judge in 1973 called attention to the problems involved in electing judges even as the candidates themselves made court reform the principal issue in the campaign. The 1974 race again underscored the problems of electing judges by demonstrating the crucial role of financing in campaigns for judicial office.

The new chief judge of the court of appeals, Charles D. Breitel, has taken an extraordinarily active position on court reform. The chief judge, himself a member of the Commission on Standards of Judicial Administration which produced the A.B.A. standards, has become an outspoken supporter of merit selection and other major court reform proposals. His stand on merit selection, however, differs from that of most other reformers in New York. Judge Breitel favors a system of merit appointment whereby the appointing officer himself generates the names of candidates for the bench and then submits his choice to a judicial confirmation commission for approval or rejection. This is consistent with the A.B.A. Standards, which find both the nominating commission approach and the confirmation commission approach acceptable. The N.A.C. recommendations, however, agree with most New York reformers in finding only the nominating commission approach acceptable.

g. The Carey Position: Still Unclear.

The entire question of merit selections has taken on a new dimension since Hugh Carey became governor in January, 1975. In his State of the State message he made court reform, and particularly merit selection, one of his major goals, and, on February 24, 1975, by Executive Order, he instituted a "voluntary" merit selection system for all appointments he will make. The Carey plan established judicial nominating committees on the state, departmental and county levels. The eleven departmental committee members are chosen by a variety of people—four, in-
cluding the chairman, by the governor himself; four by the chief judge of the court of appeals; two, jointly, by four legislative leaders of both houses of the legislature; and one by the presiding justice of the department. The state committee consists of twelve members, two members (one from each party) plus the chairman of each departmental committee. The county committees consist of thirteen members, the eleven members of the departmental committee plus two members appointed by the chief executive officer of the county. At least four members of each committee must be non-lawyers, and persons other than the governor appoint the majority of the members of each committee.

The governor has also said that he supports merit selection for judgeships presently filled by election and is expected to introduce his own proposed constitutional amendment during the 1975 session of the legislature. Given the political power of the governor, and the fact that his party controls the state assembly, his proposal will undoubtedly be a key part of any reform.

If his proposal is consistent with his past statements and actions on the subject, it should raise some interesting questions. First, he has previously said that he supports merit retention. If his proposal does include merit retention, it will differ in that respect from the position of most other reformers.

Second, in his Executive Order, he has placed no limitation on the number of candidates he will consider for each vacancy. In this respect he has adopted the practice of the Mayor's Committee on the Judiciary. This practice, however, has been criticized because it has the effect of allowing the appointing officer to keep sending names to the nominating committee until he gets one through, possibly with minimum qualifications. This is at variance with the underlying rationale for the nominating committee approach—that it ensures that the appointment will be made only from among those best qualified, rather from among all those minimally qualified. It also gives rise to the suspicion that political considerations will continue to play a major role in the selection process.

37. Id., §§ 3, 4, 5.
38. Id.
40. Id. at 2.
Third, his Executive Order permits a simple majority of each committee, rather than a two-thirds majority, to make recommendations, and on the state committee, there is likely to be a two-thirds majority of the governor's own party (all of the departmental chairmen plus one of the two members of each departmental committee). Again, this subjects the system to the charge, and perhaps the reality, that choices will be made primarily for political reasons.

2. Prospects for Reform of the Selection Process

Despite the fact that dissatisfaction with our selection process is widespread, prospects for reform are uncertain. Many legislators who oppose the present system would prefer to reform it within the framework of the elective system. Manhattan Democrats have recently agreed to nominate only persons found qualified by screening committees, and proposals have been introduced to make such a system mandatory. There have also been proposals to reform the campaign financing laws, change the Canons of Judicial Ethics to permit judicial candidates to speak out, provide for nonpartisan judicial election, and replace judicial nominating conventions with primaries.

Even those favoring merit selection do not agree on such basic issues as whether to have nominating or confirming commissions, who the members of such commissions should be, who should choose them, whether merit retention should be part of the plan, and in which courts and in which areas it should apply. Support for merit selection is likely to depend on the way the governor's voluntary plan works, and that will not be known for some time.

Most important, selection of judges is such a political issue that, in a legislature where the Democrats control the statehouse and the assembly, and the Republicans control the senate, political factors not directly related to judicial selection are likely to determine the outcome.

B. Judicial Discipline.

The question of how our judges should be held accountable is far less political than how they should be selected. There seems to be a general consensus that the system which existed until the beginning of this year was cumbersome and inadequate, and in-

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spired little confidence among the general public. The newly established Commission on Judicial Conduct seems to be an idea whose time has come, and debate now centers on such questions as its membership, jurisdiction, and powers and to whom it should report.

Recent articles such as Jack Newfield's *The Ten Worst Judges in New York*, and the *Next Ten Worst Judges* and the efforts of Special Prosecutor Maurice Nadjari have focused public attention on the more sensational kinds of judicial misconduct, such as corruption and venality. Provable cases of this kind, however, constitute but a small minority of all cases of judicial misconduct. The real problem is making sure that judges measure up to certain standards of conduct in the day to day operation of the courts without compromising judicial independence.


Although the N.A.C., A.B.A. and Dominick Commission recommendations on judicial discipline differ from each other in some respects, there is general agreement as to the standards which should be used to measure judicial conduct and the kinds of problems that need to be dealt with. The A.B.A. standards state that "A judge should be subject to discipline or removal from office for misconduct, disability or gross incompetence amounting to disability." The N.A.C. standards say that "A judge should be subject to discipline or removal for permanent physical or mental disability seriously interfering with the performance of judicial duties, willful misconduct in office, willful and persistent failure to perform judicial duties, habitual intemperance or conduct prejudicial to the administration of justice." The Dominick Commission's recommended grounds for discipline were "misconduct in office, persistent failure to perform duties, habitual intemperance, conduct prejudicial to administration of justice, and final conviction of a crime punishable as a felony or involving moral turpitude."

The Dominick Commission fleshed out these generalities by identifying the various types of misconduct and incapacity, in increasing order of seriousness, as follows:

45. *ABA Standards* § 1.22.
46. *NAC Standards* 7.4.
48. *Id.* at 60, 61.
Conduct on the Bench
- administrative misconduct—such as, not filling out reports, not wearing robe, not advising proper officer of actions
- laziness—such as, starting court late, ending early, taking afternoons or days off, taking extended vacations, not appearing at scheduled cases without explanation, slowness in deciding cases
- lack of patience with persons in court—such as, cutting off counsel and witnesses, being abrupt with court personnel
- rudeness and arbitrariness—such as, shouting at, berating or making derogatory comments about persons in court
- improper use of alcohol—such as, appearing in court with odor of liquor on breath or partially under influence of alcohol
- inability to hold court because under influence of alcohol
- showing bias against certain classes of litigants—such as, making derogatory comments based on race, religion, or other characteristics of persons in court
- allowing personal considerations to influence judicial decisions—such as, favoring friends or making decisions which would indirectly favor self or friends
- corruption in office—such as, agreeing to decide a case in favor a party in exchange for money

Conduct off the Bench
- devoting excessive time to non-judicial duties
- excessive concern with publicity
- financial “wheeling and dealing”
- indirect political activity
- associations with persons that give rise to suspicions about partiality—for example, litigants, politicians, lawyers, or reputed underworld figures
- running for public or political office
- engaging in immoral conduct
- engaging in illegal conduct
- engaging in illegal conduct that involves moral turpitude

Physical and Mental Problems
- inability to make up mind
- physical infirmities that interfere with judicial activity
- psychological problems that interfere with judicial activity
- habitual drunkenness
- physical or mental disability that completely prevents exercise of judicial functions.
It would seem obvious that any mechanism designed to enforce these standards and solve these problems fairly and effectively would require, as a minimum, prompt action on allegations of misconduct, a permanent investigatory staff with substantial powers and a variety of sanctions to permit flexibility. Unfortunately, the system of judicial discipline which existed in New York until this year included none of these elements.


The state Constitution provides five procedures for removing judges, of which three are primarily legislative—impeachment, concurrent resolution of both houses, and vote of two-thirds of the senate upon recommendation of the governor.49 These three procedures are largely theoretical, however, since no judge has ever been removed by concurrent resolution, and the other two procedures have been used only once each.50

The only potentially useful method for removing superior court judges, i.e., judges of the court of appeals, supreme court, court of claims, county court, surrogate's court and family court, is by the court on the judiciary, a special ad hoc court which can remove a judge for cause or retire him for mental or physical disability.51 The court is composed of the chief judge and senior associate judges of the court of appeals and one appellate division justice from each department. The court can be convened only by the chief judge on his own motion, or at the request of the Governor, the executive committee of the state bar association, or any of the presiding justices of the appellate division departments.52 It is separately constituted for each case filed with it, and has no staff and no continuing existence as a body. It has been convened only seven times since its creation in 1948.

The fifth method of removal applies only to inferior court judges. They can be removed for cause or retired for disability by the appropriate department of the appellate division.

Recognizing the inadequacy of these methods, the administrative board of the judicial conference, which is empowered to investigate "criticisms, complaints, and recommendations with

49. N.Y. Const. art. VI, §§ 23, 24.
51. N.Y. Const. art. VI, § 22.
52. Id.
regard to the administration of justice,“ has delegated to each department of the appellate division the responsibility for receiving and making an initial review of complaints of judicial misconduct against any judge in that department. The result has been that, in addition to the constitutional remedy of removal, judges may also be reprimanded by the appellate division. In the first department since 1968, and in the second department since 1973, judicial officers have been handled by special judiciary relations committees. No formal procedures are used in the third and fourth departments.

Even with the efforts of the appellate division supplementing the rarely used mechanism of the court on the judiciary, New York’s system of disciplining judges has been severely criticized. The Dominick Commission listed eight of the most frequently heard complaints:

- It is not able to handle minor cases
- It has no disciplinary power short of removal
- It is cumbersome and acts slowly
- It lacks confidentiality
- There is no permanent staff
- There is no appellate review
- It can be preempted by the legislature
- It is used so infrequently it must not be responsive to problems.

To these might be added two others:

- The system of judges-judging-judges rarely results in visible disciplinary action, reinforcing the public’s belief that judges are more interested in protecting rather than policing the judiciary
- Most instances of judicial misconduct are never dealt with at all, because the system is activated only when a complaint is filed, and few people know how to file complaints. Besides, those with the most knowledge of judicial misconduct, practicing lawyers, are extremely reluctant to initiate charges against a judge.

The legislature attempted to deal with these problems in 1974 by establishing a temporary state commission on judicial conduct and giving first passage to a proposed constitutional amendment which would reconstitute the court on the judiciary and strengthen and make permanent the commission on judicial conduct.

53. Id.
54. DOMINICK COMMISSION REPORT, pt. II, at 60.
3. The New Commission and the Proposed Amendment.

On the question of what system should be used to discipline judges, the recommendations of the A.B.A., the N.A.C. and the Dominick Commission were substantially similar. All recommended the establishment of a permanent statewide commission on judicial conduct, composed of judges, lawyers and laymen, with power to receive, investigate and report or act on allegations of judicial misconduct. The model on which these recommendations were based is the California Commission on Judicial Qualifications. Created in 1960, the California Commission consists of five judges, two lawyers and two laymen, all of whom serve four year terms. The Commission receives, investigates and screens complaints by any person against any California judge. If it finds the complaint justified, it may recommend one of several sanctions to the Supreme Court of California, which makes the final decision. All proceedings prior to filing the record in Supreme Court are confidential.

The Dominick Commission recommended a similar system for New York, with the major difference that the commission on judicial conduct would report to a newly constituted, permanent court on the judiciary instead of to the state’s highest court.

The N.A.C., A.B.A. and Dominick Commission recommendations were the basis for the two-part package passed by the legislature last year, which was introduced by Senator Gordon as chairman of the Joint Legislative Committee on Court Reorganization. The first part of the package was an act establishing a temporary state commission on judicial conduct. The temporary commission consists of nine persons, three appointed by the governor, four appointed by the majority and minority leaders of both houses and two appointed by the chief judge of the court of appeals. One of the governor's appointees must be a lawyer, and the other two laymen. The four appointed by the legislative leaders may be either lawyers or laymen, and the two appointed by the chief judge must be judges. The commission appoints an administrator who serves at its pleasure, and the administrator

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55. ABA STANDARDS § 1.22 (a); NAC STANDARDS 7.4; DOMINICK COMM'N REP., Part II, at 57.
58. Id. § 41.1.
may appoint a permanent staff. The commission has the power to conduct hearings and to issue subpoenas, and is required to issue an annual report.

The commission may act either on complaints it receives or on its own initiative, and may make private "suggestions and recommendations" to a judge "with respect to his conduct and the performance of his official duties." If it determines that a hearing is warranted, the judge involved has the right to appear with counsel and the right to present evidence and to call and cross-examine witnesses. If after an investigation, with or without a hearing, the commission determines that the complaint warrants further action, it issues a report of its findings and recommendations to the person or body having authority over the judge involved. All records and proceedings are confidential, unless the judge involved requests that they be made public.

The second part of the package was a proposed constitutional amendment which reconstitutes and expands the powers of the court on the judiciary and strengthens and makes permanent the commission on judicial conduct. Under the proposed amendment, the court on the judiciary would consist of five appellate division justices appointed by the chief judge of the court of appeals. It would have the power to censure, suspend, remove for cause or retire for mental or physical disability, any judge of the unified court system. "Cause" would include misconduct in office, persistent failure to perform duties, and habitual interpenetration and conduct on or off the bench that is prejudicial to the administration of justice. A judge charged with a felony or subject to a proceeding before the court would be suspended from exercising the powers of his office. A final judgment of the court on the judiciary could be appealed by either the judge involved or the commission on judicial conduct to the court of appeals by permission of such court.

In addition to the powers of the temporary commission, the permanent commission established by the amendment would

59. Id. § 41.7.
60. Id. § 42.
61. Id. § 43.
62. Id. § 44.
64. Id. § 22 (b).
65. Id. § 22 (a).
66. Id. § 22 (i).
67. Id. § 22 (j).
have the power to recommend to the chief judge of the court of appeals the convening of the court on the judiciary to hear and determine charges against a judge, or to itself determine that a judge be censured, suspended or retired. In the latter case, however, the judge involved would have the right to request within thirty days that the court on the judiciary be convened to hear the case, in which event the court on the judiciary would have the power to impose whatever disciplinary measures it deemed appropriate, including removal.  

4. Prospects for the Amendment.

Assuming that the legislature gives second passage to the discipline amendment, it would go on the ballot in November for approval by the voters. Its passage would be a foregone conclusion were it not for the opposition of Chief Judge Breitel and State Administrative Judge Richard J. Bartlett.

The chief judge's major objection to the amendment is that it continues the court on the judiciary. Even worse, the chief judge feels that the amendment fails to make the court on the judiciary a permanent body as recommended by the Dominick Commission. The court, in the view of the chief judge:

should be abolished, for that institution is cumbersome, expensive and hopelessly time-consuming. It has no continuity of membership, and must be convened and make its own rules for each case. Its members are already fully engaged in work in various parts of the state. Under the proposal, the Court on the Judiciary would still hear de novo matters that had already received a full hearing and review before the Commission on Judicial Conduct. Requiring that the Chief Judge hand-pick the members of the Court on the Judiciary in each case is not calculated to inspire public confidence in the Court. The Court of Appeals, a permanent court whose members are chosen independently without regard to a particular case, is a better forum for direct review of the Commission's findings.

The chief judge and the state administrative judge also see other flaws. The amendment subjects nearly 3,000 inferior court judges “to this unwieldy process,” and provides that any judge shall be automatically suspended from office when “charged”

68. Id. § 22 (k).
with a felony, without defining what is meant by “charged.” It does not seem to empower the commission on judicial conduct to recommend removal (although this provision is rather ambiguous). Further, it does not provide a standard by which the court of appeals can determine whether an appeal will be heard, and there exists the possibility that the commission “could consist overwhelmingly of laymen.”

Despite this opposition, however, the amendment is likely to pass. It is supported by virtually every court reform group in the state, and there is as yet no opposition to it other than that of the chief judge and the state administrative judge. Although many people agree with the chief judge that continuation of the court on the judiciary is undesirable, especially as an ad hoc body, they feel that this last archaic feature can be dealt with at another time. In the meantime, the amendment represents a tremendous improvement, and 1975 may well be the year that New York finally gets an effective system of judicial discipline.

IV. THE STRUCTURE, ADMINISTRATION AND FINANCING OF THE COURT SYSTEM

A. The Idea of Unification

Modern court reform efforts trace their origins to the celebrated address by Roscoe Pound to the 1906 meeting of the American Bar Association in St. Paul. The venerable dean shocked the comfortable and complacent gathering by asserting that American judicial organization and procedure were archaic and were “the most efficient causes of dissatisfaction with the present administration of justice in America.” Pound charged that “uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice” were the “direct results of the organization of our courts and the backwardness of our procedure.” He criticized our system of courts in three respects: “(1) in its multiplicity of courts, (2) in preserving concurrent jurisdictions, (3) in the waste of judicial manpower which it involves.”

Judicial power may be wasted in three ways, according to Pound:

70. Id. at 2-3.
72. Id.
73. Id.
74. Id. at 64.
(1) By rigid districts of courts or jurisdictions, so that business may be congested in one court while judges in another are idle, (2) by consuming the time of courts with points of pure practice, when they ought to be investigating substantial controversies, and (3) by nullifying the results of judicial action by unnecessary retrials. American judicial systems are defective in all three respects.

The remedy, he thought, lay with the concept of unification of the courts, which had been done in England by the Judicature Act of 1873. Expressing his confidence in our law schools and bar associations, Dean Pound ended on an optimistic note:  

[W]e 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.

In this respect, however, Dean Pound was quite wrong. Aside from the founding of the American Judicature Society in 1913 and the publication of an article by Dean Pound in 1927, little was done to advance the theory of court unification until 1940. In that year Dean Pound himself published another article, Principles and Outline of a Modern Unified Court Organization, in which he set forth his “controlling ideas” for court reorganization: unification, flexibility, conservation of judicial power and responsibility. His reorganization plan had five parts: a unified court divided into three levels or branches; a simplified appellate procedure with all judges being judges of the whole court; the vesting of administrative authority for the system in the chief judge, assisted by a professional administrative staff, the system to be run according to modern management concepts; specialized judges rather than specialized courts; and judicial councils, consisting of judges, lawyers and laymen, to advise and assist the judges in the exercise of their rulemaking power, and to act as a check against abuses. Except for simplifying appellate procedures and utilizing judicial councils, Pound’s plan has been followed to some degree in many states, starting with New Jersey in 1947.

75. Id. at 66.
77. Pound, Principles and Outlines of a Modern United Court Organization, 23 Judicature 225 (1946).
1. **Unification in New York.**

New York made its first move toward unification in 1961 after nearly a decade of debate. Before the people of New York approved a new Judiciary Article in 1961, there had been no major reorganization of the state court system since 1846. There were about 1500 separate and autonomous courts which administered themselves and were financed by hundreds of different budgets.\(^7\)\(^8\)

The system set up by the 1961 judiciary article, which is in effect today, represented substantial progress, but leaves much to be done. It provides for a unified, statewide court system (in name, at least), and a central administration authorized to supervise courts, judges and nonjudicial personnel, to provide adequate statistics, to establish uniform rules and procedures and to arrange for the proper transfer of cases. A structure for rational financing was established and major improvements were made in establishing mandatory qualifications for judges and limitations on their outside activities.\(^7\)\(^9\)

The new system, however, falls far short of Dean Pound's goals. Nine different kinds of trial courts remain. The constitutional responsibility for administering the courts was given to the four departments of the appellate division rather than centralized under the chief judge. Court financing remains fragmented, as major courts are financed by 59 different budgets, and each of the thousands of city, town and village courts has its own budget.

**B. Problems and Proposals**

Some further progress toward unification has been made recently, particularly in the area of judicial administration. But many reforms are only half-completed, and the problems they are intended to solve remain. For convenience, I will discuss separately the problems and proposals in the areas of court structure, judicial administration and financing of the court system, although the three are closely interrelated.

1. **Court Structure**

There is substantial agreement among the recommendations of the A.B.A., the N.A.C. and the Dominick Commission as to how our courts should be structured. The A.B.A. standards state

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78. *League of Women Voters, supra* note 50.
79. *N.Y. Const. 1 art. VI.*
the general principle as follows:80

The aims of court organization can be most fully realized in a court system that is unified in its structure and administration, staffed by competent judges, judicial officers and other personnel, and has uniform rules and policies, clear lines of administrative authority, and a unified budget.

The structure of the court system should be simple, consisting of a trial court and an appellate court, each having divisions and departments as needed. The trial court should have jurisdiction of all cases and proceedings. It should have specialized procedures and divisions to accommodate the various types of criminal and civil matters within its jurisdiction. The judicial functions of the trial court should be performed by a single class of judges, assisted by legally trained judicial officers. The appellate court should have general appellate jurisdiction and should be divided into levels or tiers when a single appellate court level cannot adequately handle the appellate caseload.

After examining the situation in New York, the Dominick Commission recommended a unified court system like that described in the A.B.A. standards, with one significant difference. It recommended a two-tier trial court system instead of a single-tier system. This was done for two reasons. First, it was felt that the substantial increases in salary and related operating expenses that would result from merging the lower trial courts with the higher courts would outweigh the anticipated benefits of the merger. Second, the commission was concerned that a single-tier system might become seriously bogged down by the enormous number of minor actions at the expense of the relatively few more serious actions.81

The basis for the Dominick Commission’s recommended consolidation was that the system of separate courts for different types of matters causes jurisdictional and administrative problems which far outweigh any benefits which may accrue from the specialized court structure.82

The Commission found three categories of jurisdictional problems created by the separate court structure—fragmented jurisdiction, dissimilar procedures or results in essentially similar actions, and overlapping jurisdiction. Fragmented jurisdiction

80. ABA Standards § 1.10.
82. Id. at 10.
exists in situations where two courts are necessary to decide all aspects of a case because no one court possesses the jurisdiction to decide all the issues. This means unnecessary delay, duplication of court work, waste of judicial and nonjudicial time and added expense to litigants. Examples of fragmented jurisdiction exist in the court of claims (court lacks equity powers and power to implead third parties) and family court (court has jurisdiction over custody and support matters but not over divorce, separation and annulment).

The second jurisdictional problem is that the system allows for dissimilar procedures or results in essentially similar types of actions. Aside from making the law more complicated than necessary, these procedural anomalies raise questions of equal treatment to litigants. Examples may be found in the difference between accounting proceedings in nearly identical actions in surrogate's and supreme court, and inconsistent eminent domain procedures in supreme court and in the court of claims.

Overlapping jurisdiction, the third problem caused by specialized courts, leads to forum shopping and unnecessary duplication of court staffs. For example, both the surrogate's court and the family court have to have nonjudicial personnel processing adoption cases, over which they exercise concurrent jurisdiction.

The Dominick Commission found that the specialized court structure created administrative problems of two kinds, both tending to limit resource utilization and court accessibility. First, the diffusion of higher court caseloads among five separate courts leads to part-time courts and part-time justice in upstate counties where caseloads are light. As a result, administrative flexibility is reduced, judicial time is lost and access to the courts is limited. Second, the multiplicity of courts creates intercourt barriers to the free flow of court resources. Judges cannot always be moved from courts with light caseloads to courts with heavy caseloads.

In addition to the jurisdictional and administrative advantages cited by the Domick Commission, a third kind of advantage would result from a unified trial court. It would improve the facilities and raise the prestige and abilities of courts now consid-

83. Id. at 11.
84. Id.
85. Id.
86. Id. at 14.
87. Id. at 15.
ered to be "inferior." Under the Dominick Commission's two-tiered trial court system, the chief lower court beneficiary would be the family court, which would be merged into supreme court. Family court has a poor image. Most of the litigants are poor, there is little financial reward for litigants or attorneys, physical conditions in the courts are disgraceful in some areas and family court judges are paid less and given fewer facilities and amenities than supreme court judges. Family court judgeships are not surprisingly seen as steps to higher judicial posts, and are sometimes occupied by people whose interests lie elsewhere. Merger could not help but raise the dignity and improve the quality of justice in family court.

Proponents of the single-tier trial court system make the same case for other lower courts, which would be unaffected by the Dominick Commission's consolidation recommendation. In the words of the board of judges of the civil court of the city of New York:\footnote{Board of Judges of the Civil Court of the City of New York, Memorandum on the Matter of Court Unification to the Subcommittee of Governor Carey's Task Force on the Courts 5 (Mar. 4, 1975) (on file at the office of the Hofstra Law Review).
\footnote{Id. at 5-6.}}

Perhaps the most serious problem of fragmented and hierarchical courts is an implicit suggestion that a second class quality of justice is to be administered in the so-called inferior court. Service in such systems produces a sense of isolation and even inferiority among the judges and court personnel themselves caught up in a caste system of administering justice. Perhaps Roscoe Pound put it best when he said, "There should be no such thing as a system of little judges for little cases."

Advocates of the single-tier trial court have another strong argument: consolidation into a single trial court is actually taking place, at least in New York City, but on such an \textit{ad hoc} basis as to add to administrative confusion, to undermine morale of judges and court personnel, and to create additional problems for members of the bar. In 1974, forty-eight civil court judges and seventeen criminal court judges were assigned and served as acting supreme court justices; practically every judge of the civil court was assigned to and served in the criminal court; nine judges of the civil court were assigned to the family court and three judges of the criminal court were assigned to the civil court.\footnote{Id. at 5-6.} In 1974, civil court judges sitting as acting supreme court
Justices disposed of 4,530 civil supreme court cases out of a total of 21,046, more than 25 percent. At the same time, in the first judicial district, almost half of all judges sitting in criminal term of the supreme court were lower court judges on temporary assignment.

The use of lower court judges to handle supreme court cases can have serious consequences. On the civil side, for example, a case filed in supreme court can be transferred to civil court without consent by the parties, whenever a supreme court justice deems it to be of insufficient monetary value to remain in supreme court. Litigants in such cases may find their substantive or procedural rights affected, including their rights of appeal. On the criminal side, judges of the criminal court who sit as acting supreme court justices try felony cases without the assistance of law secretaries, perform their own research and prepare jury charges without help from the pool of law assistants.

Considering the strength of the arguments advanced for consolidation and the similarity of the recommendations of the national and state groups set up to study the question, it may appear surprising that no progress toward consolidation has been made in the legislature. The explanation lies in the realm of politics. The first political obstacle to consolidation is that, at least at the outset, it will cost a substantial amount to raise the salaries of judges and other personnel and improve the working and physical conditions of the inferior courts. Legislators and their leaders seem to have an ingrained resistance to allocating more money for the courts.

The second political obstacle is that the political leadership has a vested interest in continuing the separate existence of at least two of the courts, the surrogate’s court and the court of claims. The surrogate has tremendous patronage powers because of his power to appoint special guardians for minors whose fees are fixed by the court. In deciding whom to appoint, surrogates have traditionally been receptive to the suggestions of the party

90. Id. at 7.
93. Board of Judges of the Civil Court of the City of New York, supra note 88, at 8-9.
94. Association of Judges of the Criminal Court of the City of New York, supra note 91, at 3-4.
leaders who put them on the bench. In a merged court, different judges would handle probate work at different times, and party leaders would not always be able to count on the presence of their own judges to hand out the patronage.

The separate existence of the appointive court of claims also has political advantages. In the past, it has been a handy way for the governor to reward political followers, since his power of appointment was virtually unchecked. Even with the voluntary merit selection plan established by Governor Carey's Executive Order, political considerations may not be totally absent from the appointive process.

The outlook for consolidation is uncertain. Proponents have not agreed on whether New York should have a single- or double-tier trial court system, and the financial implications are unclear. As with other areas of reform, Governor Carey's role is likely to be critical, as is the position of the Republican-dominated state senate.

2. Judicial Administration

The Court Reorganization Amendment of 1961 represented a substantial improvement in New York's system of judicial administration. Prior to the amendment, the only court administration which existed in New York was that administered by the judicial conference, a largely advisory body created in 1955. Although each appellate division had some control over the supreme court in its district, the courts were essentially autonomous.

The amendment provided that:95

The authority and responsibility for the administrative supervision of the unified court system for the state shall be vested in the administrative board of the judicial conference. The administrative board shall consist of the presiding justices of the appellate divisions of the four judicial departments.

The administrative board in consultation with the judicial conference was charged with establishing "standards and administrative policies for general application throughout the state," and was empowered to appoint a state administrator.

The appellate divisions were to supervise the courts in their respective departments "in accordance with the standards and

95. N.Y. Const. art. VI, § 28.
administrative policies" so established, and each of the appellate divisions was empowered to designate a departmental administrator and an administrative judge or judges. Ultimate responsibility for the administration of the courts in each department lay with the presiding justice of each of the appellate divisions.96

The problem with the Amendment was that, although it created the illusion of centralized administration, power was actually diffused. As the Dominick Commission Report put it:97

[T]he problem is largely the result of highly fragmented and often unclear lines of top-level authority. Indeed, there is no "top" in the New York judicial system from an administrative, management, or leadership standpoint. No one individual or even one organizational group is ultimately accountable for the functioning of the system as a whole; rather, overall administrative and management responsibility is divided—often in unclear and inconsistent ways—among the judicial conference, the administrative board of the judicial conference, the chief judge of the court of appeals, and the four appellate divisions. The state administrator, who might be expected by dint of his title to play a leading administrative role, is the only top-level official who clearly does not have the administrative authority to do so.

The Commission recommended that:98

1. There should be a chief administrative judge responsible for the administration of the state court system, and he should have authority to carry out this responsibility. The judicial conference and the administrative board thereof should be abolished.
2. The chief administrative judge should be appointed by the chief judge of the court of appeals for a term of four years. He should not be required to be a judge or a resident of the state at the time of his appointment.

These recommendations were basically similar to the A.B.A. and N.A.C. recommendations, except that the A.B.A. recommended that administrative authority be exercised by the chief judge, assisted by an administrator and staff, rather than by a chief administrator.99 Both the A.B.A. and the N.A.C. also recommended that the chief administrator serve at the pleasure of the

96. Id. § 4.
98. Id. at 7.
99. ABA STANDARDS § 1.33 (a); NAC STANDARDS § 8.1.
chief judge rather than for a fixed term.\textsuperscript{100}

Chief Judge Breitel, however, showed that an imaginative chief judge, if he had the cooperation of the four presiding justices, could put these reforms into effect without waiting for a constitutional amendment. Judge Breitel appointed Supreme Court Justice Richard J. Bartlett as state administrator, and arranged for each of the four appellate divisions to designate Judge Bartlett as its administrative judge.\textsuperscript{101} This gave Judge Bartlett administrative authority over the entire state court system, subject, however, to the power of any appellate division to undo the arrangement at any time. A special statute was passed confirming the legality of this arrangement and creating the new title of state administrative judge for Judge Bartlett.\textsuperscript{102} Judge Bartlett subsequently reorganized the state administrator’s office as the Office of Court Administration to assist him in carrying out his new responsibilities.\textsuperscript{103}

A constitutional amendment is still necessary, however, to make centralized administration a permanent feature of our court system. The Gordon Committee presented its proposal, which was given first passage by the 1974 legislature.\textsuperscript{104}

The Gordon proposal, although similar to the A.B.A., N.A.C. and Dominick Commission recommendations, differs from them in certain respects. It provides for a chief administrator of the courts, appointed by the chief judge of the court of appeals, with the advice and consent of the senate, to serve at the pleasure of the chief judge for a term not to exceed four years. Reappointment would also be subject to consent of the senate. The proposed amendment would abolish the administrative board, remove the administrative responsibility and authority from the appellate divisions, and vest the authority and responsibility for supervision and operation of the unified court system in the chief administrator of the courts.\textsuperscript{105} The proposal also contains provisions relating to the financing of the court system.\textsuperscript{106}

\textsuperscript{100}ABA \textsc{Standards} 1 § 1.41 (a)(i); NAC \textsc{Standards} § 9.2.
\textsuperscript{101}Chief Judge Charles Breitel, Press Release, Jan. 15, 1974, on file in the office of the \textit{Hofstra Law Review}.
\textsuperscript{102}N.Y. Jud. Law § 211(1) (McKinney Supp. 1974).
\textsuperscript{103}Order of the State Administrative Judge (June 4, 1974) (authorized by N.Y. Jud. Law § 211(1) (McKinney Supp. 1974)).
\textsuperscript{104}N.Y. S. Con. Res. 415 (1975).
\textsuperscript{105}Id. § 28.a.
\textsuperscript{106}Id. § 29.a.
The most important difference between the Gordon proposal and the A.B.A., N.A.C. and Dominick Commission recommendations is that it requires senate confirmation of the chief administrator. This introduces the element of politics into the selection process. Chief Judge Breitel feels that senate confirmation threatens the independence of the judiciary and for this reason opposes the amendment. The chief judge also opposes the amendment because it establishes a fixed four year term for the state administrator, requiring senate reconfirmation, and because it abolishes the administrative board and strips the appellate divisions of their internal administrative powers.107

Because of the opposition of the chief judge, the state administrative judge and the office of court administration, prospects for the amendment are unclear. It is favored by an overwhelming majority of the legislature108 and by virtually every court reform group in the state. The chief judge’s objections are technical and seem hardly likely to appeal to a public looking for more rather than less participation in the judicial process. It therefore appears that a permanent system of centralized administration may be adopted in New York this year.

3. Financing the Court System

A necessary corollary of unified structure and unified administration of the court system is unified financing. As with structure and administration, the recommendations of the A.B.A., N.A.C. and the Dominick Commission as to financing are quite similar.109 The A.B.A. standards describe the general principle as follows:110

Responsibility for the financial support of state court systems should be assumed by state government. Where this is not practicable at once, a program should be adopted for gradual assumption of this responsibility in the course of time. The court system should receive financial support sufficient to permit effective performance of its responsibilities as a coordinate branch of government. The level of support should include ade-

107. State of New York Office of Court Administration, supra note 69.
109. ABA STANDARDS § 1.50; NAC STANDARDS § 8.1; DOMINICK COMM’N REP., pt. I, at 54-73.
110. ABA STANDARDS § 1.50.
quate salaries for judicial and non-judicial personnel, necessary operating supplies and purchased services, and provision as needed for capital expenditures for facilities and new equipment. The financial operations of the court system should be administered through a unified budget in which all revenues and expenditures for all activities of all courts in the system are presented and supervised.

New York has been extremely slow in moving toward a unified court budget. Before the 1961 amendment, courts were financed through hundreds of separate budgets. Local appropriating bodies had no guidelines or comparisons by which to gage judicial budget requests. The quality of justice varied widely, depending largely on the wealth of a particular area and the ability of a particular judge to secure his budgetary request. Courts which dispensed political patronage were usually in a better position to obtain adequate, and sometimes superfluous, staffs and facilities, while courts less well situated politically struggled to get by.

The 1961 amendment did little to improve the situation. It stated that "the legislature shall provide for the allocation of the cost of operating and maintaining" all of the courts in the state except city, town and village courts. Each court was to submit itemized estimates of its needs to the administrative board, which would then be forwarded with the board's comments and recommendations to the appropriating body concerned, which would make the final decision. The state paid only the expenses of statewide courts and certain auxiliary agencies. This represented about 20 percent of the total cost of the court system."

The Dominick Commission identified three major drawbacks to the present system. First, it has created undesirable disparities in spending levels. Second, there is no overview of the overall cost of dispensing justice. Third, there is no procedure for making actual cost data available to court administrators for use in management control and planning."

The Commission recommended a system "whereby a single, comprehensive budget would be prepared by the chief administrative judge and transmitted to the governor for submission to the state legislature. An appropriation from state funds would then be made for all court operation . . . The change to a unified

111. DOMINICK COMM'N REP., pt. I, at 59-60.
112. Id. at 54-55.
budget should take place immediately, even though there may be a limited period thereafter during which the state charges back a portion of the cost to municipalities in order to cushion the impact of state finances."

The state’s assumption of the total cost of the state’s court system was to take place “as rapidly as possible, and in no event over a period longer than ten years.” The Commission also recommended the adoption of a purpose accounting system which would allow the courts a certain amount of discretion as to the allocation of funds, to replace the present system of detailed line item control by the legislature.

Although the office of court administration has made some administrative efforts to implement these recommendations, the only legislative action was the first passage given to the Gordon Committee amendment on administration and financing. Although the proposed amendment does provide for a unified court budget to be prepared by the chief administrator and transmitted to the governor for inclusion in the budget, without revision but with such recommendations as the governor may deem proper, the amendment does nothing with respect to the assumption by the state of the costs of operating the state court system. The provision relating to costs says only that:

The state shall pay the cost of operating and maintaining such courts of the unified court system as may be provided by law; provided, however, that political subdivisions shall reimburse the state for a portion of such costs as may be provided by law.

In other words, it merely continues the existing practice of having the state legislature allocate the costs between the state and the municipalities.

If this amendment is passed by the legislature this year, there should be increasing attention paid to the question of how and when (if at all) the state should assume the total cost of operating the state court system. This can be done by simple legislation; no constitutional amendment is required. An unknown factor in the equation is the effect of the city and state

113. Id. at 54.
114. Id. at 59.
115. Id. at 56.
118. Id. § 29.a.
fiscal problems. The fact that the state is not anxious to take on new obligations may be outweighed by urgent financial needs of the city. If the state is going to provide the city with financial aid, a good way would be to assume the cost of running the courts.

V. CONCLUSION

The problems described in this article go to the heart of our court system and their resolution is a necessary precondition to making our courts more effective. But other reforms are also necessary. We must eliminate unnecessary procedural complexities, provide for adequate court facilities and support services, and make our criminal and juvenile justice systems more effective and more humane. All this will take time and will surely not be accomplished this year. But there is now a certain momentum for court reform and 1975 may see significant progress in New York.