WHAT MAKES MANAGING THE COURTS SO CHALLENGING IN THE UNITED STATES OF AMERICA?

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I. Introduction

What distinguishes the management of courts in the United States of America from the management of other organizations in that country? Surely, there are many respects in which the management of courts has features in common with that of all other organizations. In any organization (whether it be a large or small private business, a private not-for-profit organization, a court, or any other governmental body), key management concerns involve such broad areas as planning, human resources, budget and finances, information technology, facilities and other assets, and day-to-day operations to accomplish organizational purposes. To do well, any organization needs to have certain basic management conditions for success – leadership, commitment to a shared vision, effective communications, and (especially in a fast-changing world) a learning environment. Organizational success also requires that leaders and managers set goals and objectives, monitor actual performance, and assure accountability. In these respects, managing a court is no different than managing any other organization.[1]

Yet there are also many dimensions of court management in the United States that are quite different from managing a private business or a private not-for-profit organization. Courts and other government organizations differ from private sector organizations in several important ways, such as the following:[2]

- Government revenue is derived from appropriations based on taxes, rather than on decisions by customers to buy goods or services.
- Government policy decisions about allocation of resources may often be affected by partisan political considerations, including efforts to be re-elected.
- The goal of "doing good" is typically a more important objective in government than profit. As a result, measuring "successful" performance in government is usually different from using the profit measure that is often critical for private businesses.
- Governmental organizations often operate in a near monopoly situation, with few or no competitors.
- A governmental organization often may not turn away any potential customers, but must generally give service equally to all citizens who seek it.

Within these general factors applicable to most or all government operations, there are specific factors applicable to courts that affect they way they must be managed. These factors include various structural considerations,

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[1] See David Steelman, John Goerdt, and James McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium* (Williamsburg, Va.: National Center for State Courts, 2000), chapters IV and V (pp. 87-124), where I argue that most of the essential elements of successful caseflow management in a court are the very same ones that are also critical for managing courts in general, and indeed for managing any organization well. See also, Peter Drucker's discussion of managing for performance in service institutions, in *Management: Tasks, Responsibilities, Practices* (New York: Harper and Row, 1974), pp. 158-159.

[2] See David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Penguin Books, 1993), pp. 20-21.

including both external and internal influences. They also include considerations relating to the nature of the judicial process itself in federal and state courts in the United States. Finally, there are issues with change in the courts. In this paper, I want to explore the unique dimensions of court management that make it different from the management of other kinds of organizations in the U.S., whether in the public or private sector.

II. Structural Factors External to Courts in the United States

Among the considerations that affect the task of managing courts, there are several dimensions of our governmental structure that are *external* to the courts themselves. These include the role of courts in society; the special constitutional role of courts in America; the need for courts to balance independence and accountability; and the manner in which judges are selected. These factors flow in large part from our organic law as expressed in the United States Constitution and the different state constitutions, and each warrants consideration in terms of its implications for court management.

A. The Role of Courts in U.S. Society. Government promotes order in society by enforcing mandates, prohibitions and rights prescribed by law. Since the earliest times, the most prominent governmental function of courts in society has been adjudication – to do individual justice in individual cases.[3] By providing a forum to resolve disputes between citizens and to determine when persons should be punished for disturbing the peace and safety of the community, courts help to reduce violence in society. An often-quoted section of the 1787 Federalist Papers is Alexander Hamilton's observation in support of the proposed United States Constitution that the daily administration of justice is a powerful tool to promote popular support for government and provides the "cement" to hold society together, serving as "the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is most immediately awake."[4] There are different ways in which the basic role of courts present challenges for the management of courts.

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[3] There is also an array of non-adjudicatory tasks that courts do as well, including "legislative" work to develop and promulgate rules of procedure and standards of professional behavior for judges and lawyers; such "executive" functions assigned by statute as inspection of jails and prisons or appointment of certain local government officials; "administrative" functions, like the supervision of estates in probate or of businesses in receivership; and such "ceremonial" functions as the performance of marriages and the naturalization of aliens. Still another set of activities are tasks in aid of adjudication, such as caseflow management, personnel management, resource brokering, and other court management activities, which are the focus of this monograph. See Jethro Lieberman (ed.), *The Role of Courts in American Society* (St. Paul, Minn.: West Publishing, 1984), p. 2.

[4] See Alexander Hamilton, *The Federalist* No. 17, in Hamilton, James Madison, and John Jay, *The Federalist Papers* (New American Library Edition, New York: Mentor Books, 1961), p. 120. What Hamilton meant by "administration of justice" in the Federalist Papers is broader and less specific than what we now mean by "managing the courts." Indeed, the phrase "court management" was probably unheard of before the twentieth century. See Larry Berkson, "A Brief History of Court Reform," in Berkson, Steven Hays, and Susan Carbon (eds.), *Managing the State Courts: Text and Readings* (St. Paul, Minn.: West Publishing, 1977), p. 7. The origin of modern notions of court management can probably be traced to Roscoe Pound's famous speech in 1906 on "The Causes of Popular Dissatisfaction with the Administration of Justice" [*American Bar Association Reports* (Vol. 29, 1906) 395; reprinted, *Journal of the American Judicature Society* (Vol. 20, February 1937) 178, and *Federal Rules Decisions* (Vol. 35, 1964) 273], where he urged that greater attention should be given to finding greater efficiency in administering court business. See Ernest Friesen, Edward Gallas, and Nesta Gallas, *Managing the Courts* (Indianapolis, Ind.: Bobbs-Merrill, 1971), pp. 4-6.

Associated with a court's role in society is the fact that a court has little control over the amount of business that it has.[5] Courts may require that parties present a true controversy, exhaust other remedies, file a case within statutes of limitation or other time requirements, or impose other such "gate-keeping" limitations. In addition, they may require that certain formalities be met at the time of case initiation, such as imposing a modest filing fee for civil matters or requiring that documents be completed in full or in a certain manner. Yet courts have no control over the number of crimes committed, arrests made, automobile accidents caused, or decisions between spouses to terminate their marriages. Courts cannot turn away business that citizens bring to them if filings are increasing, nor can they hire advertising firms to help them elicit more business of filings are decreasing. As a result, court leaders and managers must monitor filing trends, changes in legislation, changes in police staffing, and other factors affecting the level of business that they must accept and dispose each year.

Another important consideration in the role of the court has to do with doing justice in *all* cases before a court. Because the task doing individual justice in individual cases invites attention to the unique features of each case, it operates in tension with the court management task of seeing that court resources are applied effectively and efficiently to all of a court's cases in order to assure that the court achieves just outcomes promptly, and that dispositions stay abreast of new filings. If judges take too much time deciding each case, the court may not be able to stay abreast of its inventory of cases. If judges give too little time to individual cases, then there is a threat that justice will not be done or will not *appear* to be done, with the result that public trust and confidence in the judiciary will be reduced.

Judicial leaders and court managers must balance the application of judge time and other resources in an effort to achieve optimal results in terms of both quality and use of resources. This may be accomplished at the structural level by allocating different kinds of work to general-jurisdiction and limited- or special-jurisdiction trial courts, at the level of court scheduling through the creation of specialized dockets within a court, and at the level of caseflow management through assignment of cases to "differentiated case management" tracks with separate time expectations and procedures.[6]

B. The Constitution and the Role of Courts. From the beginning of this North American republic, the proponents of our federal constitution have seen the courts as critical to both the maintenance of federalism and to the protection of our individual liberties. Our form of government is a federal republic, in which sovereignty is divided among the people, a national government, and the several state governments. In the Federalist Papers, Alexander Hamilton argued with regard to federalism that the federal courts should be the manifestation of "the majesty of the national authority," while the day-to-day operation of the state courts would constitute "a complete counterpoise" to the power of national government.[7]

1. State and Federal Relations. There are at least two features in the relations between the federal government and the state governments that present challenges in the management of courts. One of these has to do with the relations between federal courts and state courts. Striking the balance between federal and state interests has occupied the United States Supreme Court since early in the nineteenth century.[8]. Until very recently the balance of power between the two interests has been shifting in favor of the federal government, for at least two reasons: (1) a

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[5] This observation has been made by many commentators on courts. See, for example. James Duke Cameron, Isaiah Zimmerman, and Mary Susan Dowling, "The Chief Justice and the Court Administrator: The Evolving Relationship," *Federal Rules Decisions* (Vol. 113, 1987) 439, at 454, citing Wayne Oglesby and Geoff Gallas. See also, Richard Matsch, "Court Management: Balancing People and Processes," *Federal Probation* (Vol. 60, No. 1, March 1996) 58.

[6] On "differentiated case management" ("DCM"), see Steelman, Goerdt, and McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium*, pp. 5-8.

[7] See *The Federalist* Nos. 16 and 17, in *The Federalist Papers,* at pp. 116 and 120.

[8] See Chief Justice Marshall's decision in *Gibbons v. Ogden*, 9 Wheat. (22 U. S.) 204-205 (1824).

growing trend to seek national solutions to problems that have typically been under the jurisdiction of the states; and (2) states have been more willing to give up control over traditional state activities, provided that Congress provides money in the form of grants to implement its effort to regulate state affairs.[9] For state courts to be bound by a federal regulation of state court procedures, the regulation must be authorized by a valid source of congressional authority and not be otherwise unconstitutional.[10] Congress has typically relied on the Commerce Clause[11] as the source of that authority. Recently, however, the Supreme Court has decided several cases in favor of the state courts and against federal regulation.[12]

2. Court Enforcement of Individual Rights. With the 1789 federal constitution, our Founding Fathers advanced the model of a modern nation-state with several innovations that have since won worldwide acceptance. One of these was the very notion of a written constitution, which provided a yardstick against which citizens could gauge their rights and responsibilities, and which restrained the institutions of government by putting "fundamental" law above the "statutory" law of legislatures and the actions of the executive. Another critical innovation was the creation of a bill of rights that reserved essential civil rights to the people as a barrier against infringement by government. Through the notions of separation of powers and judicial review, it ensured that the courts could impose sanctions on the other branches of government if they infringed on those rights.[13]

One of the most dramatic set of events in 20th century U.S. legal history has been the "due process revolution," occasioned by the U.S. Supreme Court's application of the right to counsel and many other features of the federal Bill of Rights through the Fourteenth Amendment Due Process Clause to criminal proceedings in state courts, ensuring protection for citizens from infringements on those rights by state governments as well as by the national government.[14] From the mid- 1950's to the 1970's, this set of Supreme Court decisions fundamentally changed the nature of criminal proceedings in state and local courts, and it created the features of criminal case processing – such as timely disposition of cases in keeping with speedy trial requirements, and the provision of counsel at public expense for criminal defendants unable to retain counsel – that are day-to-day concerns of judicial leaders and court managers.

Because "due process of law" is constitutionally enshrined in our legal system, and one might well say that the "process is the product" that courts give litigants. The challenge for those responsible to manage the courts is to assure that attention to process does not defeat the court's purpose to do justice in individual cases. The process in the trial court involves the application of the law to particular facts. If too much emphasis is placed on mechanics and techniques, or if there is delay in the presentation of facts, then the quality of justice may be reduced. Judicial leaders and court managers must assure that a court has adequate resources to provide due process, maintains control over court

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[9] See Mary Grace Hune, "Federalism 2001: Shifting the Balance," in National Center for State Courts, Knowledge & Information Services, *Report on Trends in the State Courts, 2001 Edition* (Williamsburg, Va.: National Center for State Courts, 2001), p. 33, citing Mark Racicot, et. al., "States' Rights in the Twenty-first Century," *Journal of Legislation* (Vol. 26, 2000) 271.

[10] See Wendy Parmet, "Stealth Preemption: The Proposed Federalization of State Court Procedures," *Villanova Law Review* (Vol. 44, 1999) 1, at 14.

[11] U.S. Constitution, art. I, §8.

[12] See the decisions cited by Mary Grace Hune in "Federalism 2001: Shifting the Balance," in *Report on Trends in the State Courts, 2001 Edition*, pp. 34-37.

[13] See S.E. Finer, *The History of Government from the Earliest Times*, Vol. 3, *Empires, Monarchies, and the Modern State* (New York: Oxford University Press, 1999), pp. 1501-1505.

[14] See Lawrence Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), pp. 294-323.

procedures, and prevents delay or distortion in the presentation of facts, so that individual litigants receive justice and have their rights protected.[15]

C. Balancing the Independence of the Judiciary with the Need to be Accountable to the Public. Another important value expressed in our federal and state constitutions is the notion of judicial independence. Citing Montesquieu that "there is no liberty if the power of judging be not separated from the legislative and executive powers,"[16] Alexander Hamilton wrote in the Federalist Papers that having independent courts would be essential to the protection of constitutional rights.[17] As the Commission on Trial Court Performance Standards has observed, however, independence of the judiciary is not likely to be achieved if a court does not manage itself, measure its performance accurately, and account publicly for its performance.[18]

Despite the theoretical independence of the judiciary, budgeting relations with state-level executive and legislative branch officials and with local funding authorities have traditionally made court systems much more of a dependent branch of government. Courts are almost totally dependent on political processes for their resources. At the state level, this means that governors and legislators have significant influence on the judicial branch budget, as the following statistics on 1998 state court organization indicate:

- Among the 50 states, the District of Columbia, and Puerto Rico, court systems in fewer than half (24) submit the judicial budget directly to the state legislature; 19 submit the judicial budget to the executive branch; and 9 submit it to the legislature and the executive branch.
- In 18 of these states or territories, the executive branch can amend the judicial budget, and in 15 this is done routinely.
- In only 14 states or territories is the judicial budget submitted as a separate bill.[19]

Trial court funding was largely a local responsibility until around 1950, and it is still typically split between state and local sources in most states. Court organization statistics for 1998 show the following:

- Trial-court judicial salaries in 35 of the states or territories are largely paid by the state.
- Trial court administrator salaries are paid by the state in 23 states or territories.
- Clerk of court salaries for trial courts are paid primarily by the state in 20 states or territories.
- Expenses for trial-court facilities are paid largely or in full by the state in only 6 states or territories.
- All or virtually all trial-court expenses are paid by the state in only 11 states or territories, and in all the others a substantial share of the cost is borne by local government units.[20]

The dependence of courts on other branches of government at the state and local levels can create potential conflicts for judicial leaders, individual judges, and court managers. Courts must regularly decide cases in which they judge the other two branches. They must serve as arbiters between individual citizens and state officials, county

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[15] See Friesen, Gallas, and Gallas, *Managing the Courts*, pp. 17-18.

[16] See Montesquieu, *The Spirit of Laws* (ed. David Wallace Carrithers)(Berkeley, Calif.: University of California Press, 1977), Book XI, Chapter 6 [5].

[17] See *The Federalist* No. 78, in *The Federalist Papers,* at pp. 464-466.

[18] See Bureau of Justice Assistance, *Trial Court Performance Standards With Commentary* (Monograph NCJ 161570)(Washington, D.C.: U.S. Government Printing Office, 1997). p. 18.

[19] See Bureau of Justice Statistics. *State Court Organization 1998*, by David Rottman, David, Melissa Cantrell, Randall Hansen, and Neil LaFountain (Washington, D.C.: U.S. Department of Justice, 2000), Table 17.

[20] Ibid., Table 18.

commissioners, or city government officials. In such circumstances, the courts must exercise judicial independence in making decisions affecting government entities that may provide or veto court resources.[21]

Confronted by budgetary politics with funding authorities, courts from time to time have invoked "inherent powers" – those essential to the existence, dignity and functions of a court because it is a court, or those that are necessary for the orderly, efficient, and effective administration of justice.[22] Reasoning that such inherent powers do not exist for the comfort and convenience of the judiciary, but rather as a means to ensure that courts serve the public interest, trial courts often issued writs of mandamus ordering local funding authorities to provide resources considered necessary for court operations. The growth of state funding has curtailed inherent powers litigation over financial issues, although pressures to hold down taxes has led governments at state as well as local levels to resist expenditure increases even when courts and other public entities point to increasing needs.[23]

It is only in recent years that court system leaders have acknowledged that being a separate branch of government is only an illusion unless they make it real through effective administration and management. Since the 1950's, proponents of strong management in the judiciary have had to bring trial courts into a true state judicial system, removing them from their positions in local government structures, operating under the administrative direction of the state court of last resort, enlisting professional managers, and providing for greater state-level funding. Underlying these changes was the premise that without judicial leaders' exercise of effective administrative control over the court system, the judiciary could not really be a separate and independent branch of government.[24]

Traditionally, the appellate process and trial de novo, supplemented by electoral politics, were the primary means by which judges were held accountable. Otherwise, courts were able to insulate themselves from administrative responsibility and accountability, in part because of overlapping jurisdiction among courts, which made it difficult to identify who was responsible for what activities, and in part because court administrative functions were shared among different institutional actors, not all of whom were under court control. With the twentieth-century court improvement efforts, however, including both court unification and other efforts by court leaders to expand judicial control over court system affairs, the ability of external agencies to hold courts accountable for effective management of their affairs has increased.[25]

For courts, accountability to "the public" varies with the perspective of *different* publics, although it ultimately involves concepts of justice. For judges, emphasis is on whether the law is appropriately applied to a fact situation, so that the most appropriate control mechanism involves other judges, either through the appellate process or through administrative rules and procedures. Legislators are concerned with appropriate resource allocation and politically sensitive court decisions, and they have questions of judicial productivity. News media representatives see accountability as information, and it emphasizes making court activities available for public scrutiny. The legal profession has still another perspective about accountability, involving fairness and access: to meet the needs of lawyers, courts must be predictable and adhere to accepted legal norms.[26]

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[21] See Ernest Friesen, "Constraints and Conflicts in Court Administration," in Berkson, Hays, and Carbon (eds.), *Managing the State Courts*, p. 38.

[22] Felix Stumpf, *Inherent Powers of the Courts: Sword and Shield of the Judiciary* (Reno, Nev.: National Judicial College, 1994), p. 3.

[23] Carl Baar, "Inherent Powers: Trends and Prospects," in Stumpf, *Inherent Powers*, at xxiv.

[24] See Robert Tobin, *Creating the Judicial Branch: The Unfinished Reform* (Williamsburg, Va.: National Center for State Courts, 1999), pp. 21-23.

[25] Thomas Henderson and Cornelius Kerwin, *Structuring Justice: The Implications of Court Unification Reforms. Policy Summary* (Washington, DC: National Institute of Justice, 1984), pp. 13-15.

[26] Ibid., pp. 15-16.

D. Selection of Judges. Judges are the dominant people in courts and the court process. Unlike courts in civil law countries like France and Germany, there is no formal educational or career path to a judgeship in the United States.

Like hospitals and universities, courts are organizations dominated by their key professionals. A professional organization is different from a business – it is more complex, vague and diffuse than a business organization in terms of structure and the distribution of power.[27] Judges are not selected by the people who are responsible for their performance. Judges who are selected for the wrong reasons may not possess the qualities or motivation needed to perform all of the duties required of a judge.[28] Because of the manner in which judges affect the nature of a court and its management, it is critical to consider the kinds of people who become judges and the manner in which they reach the bench.

1. What types of people become judges? Some information about some elements of the demographics and characteristics of people who come to the bench as judges has been gathered from time to time by researchers, and it is worthwhile to see the effects of those factors on the courts. Another kind of information about judges is very intriguing – how the personality types of judges (as measured by a common personality inventory) bear on judges' cognitive and judgment processes – and this also provides valuable insights on the challenge of court management.

a. Background of people who become judges. The judicial profession in America has high prestige, but relatively low pay in comparison to what attorneys in lucrative private practices earn, and it can involve a significant volume of work. Research suggests that state judges are a distinct subset of all lawyers. Political factors and self-selection tends to narrow the candidate pool regardless of whether judges are elected or appointed.[29]

One factor affecting interest in being a trial judge is a lawyer's level experience in court as an advocate. Criminal lawyers make frequent appearances in court as advocates, while civil lawyers may be in firms with specialized litigation departments. Income is also important – state judges tend to make less money than successful partners in private law firms, while solo practitioners and certain members of small firms may have sufficiently marginal incomes to make the stability of a judgeship seem financially attractive. Private criminal lawyers often are solo practitioners or members of small firms, which may make the relative independence of a judge's professional life attractive; but private criminal lawyers may be unattractive to voters or nominating commissions because they have represented poor and socially-undesirable clients. Court experience is important: prosecutors seem to have an inside track to state judgeships, while state judges and U.S. attorneys are well positioned to move to the federal bench.[30]

There are also appear to be regional variations in the background of judges. In the northeast, where judges tend to be older at the time of their selection to the bench, a general-jurisdiction trial court judgeship may be a reward for past political service or lower court apprenticeship, while a trial judgeship in the south may often be a potential stepping-stone to higher political office.[31] The occupational backgrounds of general-jurisdiction trial judges tend to reflect the communities from which they come. In Los Angeles, as in most large industrial states, such judges come largely from the

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[27] See David Saari, "New Ideas for Court Administration: Applying Social Science to Law," *Judicature* (Vol. 51, 1967) 82, at 85, as discussed by Keith Stott, in "The Judicial Executive: Toward Greater Congruence in an Emerging Profession, *The Justice System Journal* (Vol. 7, No. 2, Summer 1982) 152, at 155.

[28] Friesen, Gallas, and Gallas, *Managing the Courts,* p. 52.

[29] See Jerome Corsi, *Judicial Politics: An Introduction* (Englewood Cliffs, N.J.: Prentice-Hall, 1984), pp. 115-116.

[30] Ibid., p. 152.

[31] Ibid., p. 116; John Paul Ryan, Allan Ashman, Bruce Sales, and Sandra Shane-DuBow, *American Trial Judges* (New York: Free Press, 1980), p. 141.

lower-court bench. In Chicago, judges are drawn heavily from the public and political sectors, where they have labored to achieve a reward or capstone to their professional careers. In Philadelphia, general-jurisdiction judges come largely from private practice because the lower courts have historically been staffed by non-lawyers.[32]

b. Judicial personality types. As a psychometric tool to help judges focus on their own cognitive and judgment processes during judicial education courses on judicial fact-finding and decision-making, Judge John Kennedy has administered the Myers-Briggs Type Inventory (MBTI) to over 1,300 judges.[33] This personality inventory scores people on four dimensions: (1) extroversion and introversion; (2) sensing and intuition; (3) thinking and feeling; and (4) judging and perceiving. A person's "personality" consists of a combination of all four scales.

There are 16 possible MBTI combinations, and some show up much more frequently among judges than others.[34] Nearly 62% of judges are "thinking-judgers" – more than double the percentage of this personality type in society as a whole. "Thinking-judgers" are variously described as controlling personalities, executive types, and organizational leaders – they run things. Differences among them are not *whether,* but *how* they run things. The most common "thinking-judgers" among judges are "ISTJ" (introverted-sensing-thinking-judging) judges (23% of the author's tested judges), who tend to manage by memorandum or fiat. They dislike meetings and feel that committee activities are unproductive. Most are happy running their own courtrooms but do not aspire to oversee their colleagues or their local judiciary, preferring to be left alone and resisting outside interference. They are dutiful and hard working, follow rules and insist that others do so as well.

The second most common type of "thinking judger" judges (17% of Kennedy's tested judges) are "ESTJ" (extroverted rather than introverted) judges. They differ from "ISTJ" judges in their management styles, and they are our favorite people managers and presiding judges. They are decisive, do not play favorites, and follow the rules; like "ISTJ" judges, they are hardworking and responsible. Unlike "ISTJ" judges, however, they are willing to meet and consult with others, respecting the opinions of others in decision-making. On the bench, they listen and are tough, but they communicate concern and consideration for others.

"INTJ" (introverted-intuitive-thinking-judging) judges (11% of Kennedy's tested judges) are very different from "ISTJ" judges. "I<u>S</u>TJ" judges use power, control and rules to maintain existing systems; but "I<u>N</u>TJ" judges as "intuitive" persons believe everything can be changed for the better, and as "introverts," they often believe that they alone have the knowledge and inspiration to bring about that change. Like "ISTJ" judges, they dislike meetings and committees, but that is because they think that meetings and committees might interfere with change and progress. While "INTJ" judges want to change systems, "ENTJ" judges (10% of Kennedy's total) want to change people. While "INTJ" judges write books and draft memoranda to bring about change, "ENTJ" judges form committees and hold meetings to inspire others.

2. Elective and appointive processes. The formal manner in which judges are selected reveals the ambivalence that U.S. citizens have historically had about the judiciary. In the colonial era, judges were appointed by the crown, which made them suspect in the eyes of those seeking independence. After the revolution, federal and state judges were appointed, but this led in the early nineteenth century to a reaction among citizens against the appearance of elitism that it presented. In the era of Jacksonian Democracy, many states consequently provided for local election of judges, clerks of court, and other officials.[35] Yet the election of judges has in turn raised the prospect that they might be too political, too beholden to partisan interests, and insufficiently qualified to perform judicial responsibilities well. This led

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[32]Ryan, et al., *American Trial Judges,* p. 220.

[33] See John Kennedy, "Personality Type and Judicial Decision-making," *The Judges' Journal* (Vol. 37, No. 3, Summer 1998) 4.

[34] Ibid., at 8-9. Discussion here highlights some of Judge Kennedy's observations in his article about MBTI results for judges.

[35] See Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), pp. 109-121 and 323-339.

in the twentieth century to the development of mechanisms for merit selection of judges, as illustrated in the "Missouri Plan," to provide for a degree of objective and non-political assessment of a potential judicial candidate's qualifications for office.[36]

The result of these historical developments is that there currently is a mix of selection methods for state court appellate and trial judges in the United States. The different methods are summarized in the following table:

Table 1. Initial State Judicial Selection Methods, 2000[37]

Merit Selection through Nominating Commission:	15 states and DC		
Gubernatorial Appointment without Nominating Commission:	3 states		
Legislative Appointment without Nominating Commission:	2 states		
Partisan Election:			9 states
Nonpartisan Election:		12 states	
Combined Merit Selection and Other Methods:		9 states	

In states where selection of judges is done by partisan or non-partisan election, there is substantial evidence that the cost of judicial campaigns is growing. In such states, some have found a pervasive public perception that campaign contributions influence judicial decision-making, and that judges are guilty of favoritism when they make decisions that favor contributors.[38] Seeing an alarming increase by special interest groups in recent years to influence the outcome of judicial elections through both financial contributions and "attack campaigning," the American Bar Association recently reiterated its support for merit selection.[39]

The presence of politics has a clear bearing on the nature of court management efforts in a court. Judges who are also politicians may find that taking a position that would involve the exercise of management responsibility might also create a risk of negative public opinion, or it might generate politically damaging controversy.[40] A 1980 study of the work styles and performance of state and local trial judges found that court politics and partisan politics reduce the likelihood that judges and court staff members will complete their tasks competently.[41] Even if it had no demonstrable effect on actual court performance, the level of politics associated with the selection of judges has a clear and palpable impact on the atmosphere and interactions in a courthouse.

III. Structural Factors Internal to Courts in the United States

In addition to external considerations, there also are also several structural matters *internal* to courts that impose restraints on their day-to-day management. One set of factors has to do with norms in the judicial and legal culture, norms having to do with courts as organizations dominated by professionals, and the impact of status, prestige

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[36] See Tobin, *Creating the Judicial Branch: The Unfinished Reform,* pp. 27-30.

[37] American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (Chicago: American Judicature Society, 2000).

[38] See American Bar Association, Standing Committee on Judicial Independence, *Report of Commission on Public Financing of Judicial Campaigns* (Chicago: American Bar Association, 2001), pp. 9-20.

[39] See American Bar Association, *Standards on State Judicial Selection* (Chicago: American Bar Association, 2000), p. iv.

[40] Steven Hays, "The Traditional Managers: Judges and Court Clerks," in Steven Hays and Cole Blease Graham (eds.), *Handbook of Court Administration and Management* (New York: Marcel Dekker, 1993), p. 230.

[41] See Ryan, et al., *American Trial Judges,* p. 115.

and power in courts. Another set has to do with the selection and tenure of those responsible for leading and managing courts (chief or presiding judges, clerks of court, and court administrators).

A third set of internal considerations involves the dynamics of the court setting for management, including such factors as attitudes about professional management, as well as views on collaboration and accountability. Finally, there are considerations about the process of managing courts, including the way in which responsibilities for leadership and management are allocated and the ways in which future leaders and managers are groomed.

A. Culture and Norms of Judges and Lawyers. The most visible participants in the court process are judges and lawyers. As a result, the culture and norms among judges and lawyers are something that judicial leaders and court managers must always take into consideration.

Most attorneys have been trained as soloists from the commencement of their careers, without attention to team or organization work, and this does not prepare lawyers for membership in an organization. When attorneys become judges, they value independence as important to impartial decision-making, but many may have no sense of duty to the judicial organization. Defending their own independence, they may want to protect the individual freedom of all judges in a court system, even if this would be destructive of necessary court management action. Such a soloist approach breeds antipathy toward court administration and may manifest itself in court organizations as opposition to strong management. Left to themselves, many judges would only rarely support the selection of a strong chief or administrative judge to manage their affairs.[42]

Court management has traditionally been a topic of only peripheral interest to judges and lawyers. Judges probably have more interest in court management than lawyers, because being on the bench alerts them to the complexities of organizational life and allocation of resources in a government organization. Yet there are many judges who have little or no interest in the management of courts beyond managing their own individual courtrooms.[43] Some judges may also be inclined to divorce leadership from management, based on reasoning that justice is the court system's first concern (with judges leading), while management is a secondary consideration (with court administrators managing).[44]

Many judges and lawyers who have not attended education programs or developed special skills are not particularly suited to deal with management problems unless they happen to possess unusual attributes. Their approach to issues is guided by their professional training, so that they may see legal problems where management problems exist or apply legal-authoritarian solutions where management solutions are needed.[45]

B. Predominant Professional Cultures and Norms. One feature of courts that makes them unique is the fact that the key personnel in many state courts – judges – are the only major professionals in the United States who are elected and also have a professional status.[46] Like other "professional" persons, a judge has (1) mastery of an organized

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[42] Ernest Friesen, "Constraints and Conflicts in Court Administration," in *Managing the State Courts*, p. 40.

[43] This hardly differs from the interest that many physicians may have in hospital administration, among all of the topics of potential interest to health-care administrators. See David Saari, *American Court Management: Theories and Practices* (Westport, Conn.: Quorum Books, 1982), pp. 3-4.

[44] See Ronald Stupak, "Court Leadership in Transition: Fast Forward Toward the Year 2000," *The Justice System Journal* (Vol. 15, No. 1, 1991) 617, at 619.

[45] See Friesen, Gallas, and Gallas, *Managing the Courts*, p. 13.

[46] See David Saari, "New Ideas for Court Administration: Applying Social Science to Law," *Judicature* (Vol. 51, 1967) 82.

body of specialized knowledge; (2) a specialized competence, based on aptitude, training and experience; (3) extensive autonomy, influence and responsibility in the exercise of that competency; and (4) a strong career commitment.[47]

In a study of organizational structures, Henry Mintzberg theorized that there are five basic models for organizations: (1) ad-hoc organizations, as in a young, adaptable research organization; (2) simple structures, such as those of a small business; (3) 'machine' bureaucracies, such as those of large, centrally-controlled organizations; (4) divisionalized forms, as in organizations with semi-autonomous divisions; and (5) professional bureaucracies or collegial organizations, as in universities.[48] In a professional bureaucracy like a court, the professionals operate in keeping with the standards of their professional members (in courts, the standards of judicial conduct), while "bureaucrats" operate in part in compliance with standards and guidelines that originate in self-governing associations outside the organization (such as the National Association for Court Management's "Core Competency Curriculum Guidelines"[49]).

In a professional bureaucracy, writes Mintzberg, support staff are often more numerous than professional staff and constitute a more rigid and controlled organization. Professionals control their own work, but they also seek the collective control of the administrative decisions that affect them. What frequently emerge are parallel bureaucracies, "one democratic and bottom up for the professionals, and a second 'machine' bureaucratic [i.e., more like a large, centrally-controlled business organization] and top down for the support staff."[50] For judicial leaders and court managers, such a dual structure can create a conflict between "collegial" and "authoritarian" decision-making. In the collegial decision-making process among judges, decisions are made among equals; but the administrative decision-making process often requires a more authoritarian approach. More authoritarian judges cannot simply dictate policy to other judges, but must typically take a more cooperative and team-oriented approach to leadership.[51] More collegial chief judges may have difficulty being authoritarian in the administrative arena, and any non-judge court manager must deal effectively with the collegial nature of decision-making among judges.[52]

To be effective, court administrators must understand and accept courts as professional bureaucracies, building on or compensating for the strengths and weaknesses of courts as professional organizations.[53] A collegial organization, for example, tends to exhibit participatory democracy among its professional members, and a court extending this freedom to its administrative staff will be able to deal more effectively with concepts of democracy in the work place. The court administrator must also try to compensate for the blind spots of judges as professionals, such as their potential unresponsiveness to problems requiring interdisciplinary perspectives, or their possible difficulty in working collaboratively with other groups.

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[47] Friesen, Gallas, and Gallas, *Managing the Courts,* p. 150.

[48] See Mintzberg, *The Structure of Organizations* (Englewood Cliffs, N.J.: Prentice-Hall, 1979).

[49] See National Association for Court Management, Professional Development Advisory Committee, "Core Competency Curriculum Guidelines: History, Overview, and Future Uses," *The Court Manager* (Vol. 13, No. 1, Winter 1998) 6.

[50] *The Structure of Organizations,* pp. 358-360, as discussed by Keith Stott, in "The Judicial Executive: Toward Greater Congruence in an Emerging Profession, *The Justice System Journal* (Vol. 7, No. 2, Summer 1982) 152, at 157-158.

[51] Steven Hays, "The Traditional Managers: Judges," in Berkson, Hays and Carbon (eds.), *Managing the State Courts,* p. 171.

[52] James Duke Cameron, Isaiah Zimmerman, and Mary Susan Dowling, "The Chief Justice and the Court Administrator: The Evolving Relationship," *Federal Rules Decisions* (Vol. 113, 1987) 439, at 453.

[53] Stott, "The Judicial Executive: Toward Greater Congruence in an Emerging Profession," at 158.

C. The Use of Status, Prestige, and Power. The fact that courts and the legal process are dominated by judges as high-status professionals means that the way that judges use their status and prestige has significant bearing on how courts are led and managed. One commentator sees "the heavy hand of status-laden descriptions of responsibilities" as a significant problem of leadership failure in some courts. This is most problematic in courts where judges see non-judge court employees as "second-class citizens" for whom a top-down leadership style is most desirable. This usually leads, says this commentator, to failure by court staff to take any risks, and to "authoritarianism of the worst sort, under which personal style overwhelms institutional infrastructures, and rational management principles are drowned in the ego needs of judges."[54]

Authority and power are inevitably part of the court environment, since judges are vested with the authority and power to order individual citizens and even government officials to perform or desist from performing certain actions, and to use the power of the state to enforce compliance through the imposition of sanctions.[55] The use of power is important to the success of judicial leaders and court managers. Power is exercised in different ways at different levels of a court or any other organization:[56]

- Upper level leaders and executives focus their use of power primarily outside the organization, negotiation and working as advocates for the organization in external settings.[57]
- Middle-level management power flows tend to be horizontally oriented, typically to advance an organizational cause by competing for or pooling resources with others who are on the same organizational level.
- First-line supervisors and managers tend almost exclusively to use power "down" in the organization to complete specific tasks within a particular department or unit.

Because of their personal style and professional background, judges are inclined to use power primarily in an individual and independent way, and court managers cannot expect them judges to initiate the development of collaborative or team relationships.[58] Administrators in courts as professional bureaucracies (see section III.B) tend to lack the direct power that managers in other kinds of organizations typically possess, although they need not be either ineffective or impotent. Rather, they can exercise considerable indirect power from their service as negotiators and liaisons between the court and other institutional actors in the court process. Moreover, they can at times be more powerful on a day-to-day basis than some of the judges, even though that power might easily be overwhelmed by the collective power of the judges, and recognizing that such power would last only as long as judges perceive them to be serving the judges' interests effectively.[59]

D. Selection and Tenure of Court Leaders and Managers. Traditionally, the task of managing courts has been the responsibility of judge leaders and clerks of court. Involvement of a third group – professional court

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[54] Ronald Stupak, "Court Leadership in Transition: Fast Forward Toward the Year 2000," at 620.

[55] See Friesen, Gallas and Gallas, *Managing the Courts,* p. 113.

[56] Ronald Stupak, "Court Managers as Leaders: An Active Strategy for Understanding and Using Power," *The Court Manager* (Vol. 16, No. 2, 2001) 19, at 20.

[57] Service as a spokesperson on behalf of the court in discussions with such representatives of outside organizations as prosecutors and county board members is an important way for the chief judge of a trial court to use the power of that position. See David Rottman and William Hewitt, *Trial Court Structure and Performance: A Contemporary Reappraisal* (Williamsburg, Va.: National Center for State Courts, 1996), p. 86.

[58] Stupak, "Court Managers as Leaders," at 20.

[59] See Keith Stott's discussion of Henry Mintzberg's theoretical framework for understanding the management of professional organizations as it applies to court management, in "The Judicial Executive: Toward Greater Congruence in an Emerging Profession," at 157-158.

administrators – is a more recent development. For each of these groups, selection methods and tenure have a bearing on the manner in which court leadership and management must be done.

1. Selection and Tenure of Chief Justices and Chief Judges. Ultimate responsibility for the effective operation of courts resides in the judges, and most particularly in the chief justice of the court or last resort[60] and the chief or presiding judges of trial courts and intermediate appellate courts. The manner in which these judicial leaders are chosen is critically important to the manner in which courts are led and managed. It is worthwhile to look at all three levels of court – courts of last resort, intermediate appellate courts, and trial courts.

a. Courts of last resort. State and federal court systems vary considerably in the way that the chief justice is chosen.[61] Over the years, states have been fortunate when their selection process has yielded chief justices with a balance of legal talent and leadership ability. The different selection methods can also reflect perceived qualities other than legal scholarship, leadership or management capacity, however. For example, the chief may be personally popular or may be a person who has been politically active – qualities that might well be beneficial to a court system. But a state's selection method may also lead to the choice of a member of the bench who is not threatening to the status quo, which may be problematic in times that require difficult leadership and management decisions.

While no state has a term of office shorter than 6 years for any justice of the high court, there are 20 states in which the chief justice's term of service is *shorter* than the term of office for any justice (ranging from 1 to 5 years), so that no justice in such a state serves a full term of office as the chief justice unless the chief succeeds himself or herself in that role.[62] Yet most states permit a chief justice to succeed himself or herself in that position, and most states, in effect, permit the chief to serve in that role from the time he or she is selected until retirement or departure from the high court bench. This can often give a fair degree of continuity and stability in terms of judicial leadership in a state's court of last resort. It will be particularly valuable for a court system if the chief justice is a person with vision and leadership skills. On the other hand, it may mean management drift or a lack of court system leadership if the person in this position lacks the requisite skills and experience.

b. Intermediate appellate courts. Intermediate appellate court judges typically must deal with a higher volume of appellate cases than courts of last resort, and with a smaller relative workload of such serious cases as capital murders and matters of great and lasting social significance. Selection methods for the chief judge of an intermediate

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[60] It should be noted in passing that in two states (New York and Maryland), the leader of the court of last resort has the title of "chief judge," and not "chief justice."

[61] The President appoints the Chief Justice of the U.S. Supreme Court with the advice and consent of the Senate. The court of last resort selects its own chief justice in 19 states. The next most common selection methods are popular election (7 states), gubernatorial appointment (7 states), seniority (6 states), and gubernatorial appointment from nominees by a merit selection commission (5 states). The most common selection process is thus typically one in which the chief justice is a person who has the support of a majority of his or her colleagues. Popular election or gubernatorial appointment may both reflect the checks and balances in a jurisdiction's constitutional order, and they also mean that partisan political factors may affect the leadership of the court system. See Bureau of Justice Statistics, *State Court Organization 1998,* Table 5.

[62] The most common terms of office for all high court justices in a state are 6 years (14 states), 8 years (12 states), and 10 years (12 states). In 18 states, the duration of service for a chief justice is equal to the term of office for any other justice, and in 12 other states the chief justice's term of office is not specified in years (rather, it is "for the duration of service" on the court, for an indefinite period, until age 70, for life, or until the chief declines the position). There is one state that allows a chief justice to serve in that role for only a year, and two years is the duration of service in six states. In these states, the duration of service as chief justice may be so limited that the incumbent has little time to establish any pattern of leadership. See *State Court Organization 1998,* Table 5.

appellate court may often be different from those for the selection of the chief justice of the court of last resort in the same jurisdiction.[63]

The term of service of a intermediate chief judge is usually shorter than that of the chief justice of the court of last resort, and an intermediate judge is less likely than the chief justice to have a term of service as chief judge that is as long as his or her term of office on the court.[64] Selection of an intermediate appellate court chief judge is much less likely than that of the state chief justice to be subject to the partisan politics that can be associated with either gubernatorial appointment or popular election. Instead, selection of the intermediate chief is more likely to be done within the appellate court community – either by the court of last resort or the intermediate court itself. Finally, the tenure of the intermediate chief is often subject to review, either by the high court or by the chief judge's own colleagues.

c. Trial courts. In most states, a trial court has a chief or presiding judge, who may or may not receive extra compensation while in that position. From one state to the next, and often from one level of trial court to the next, there can be great variation in the formal administrative authority of that judge.[65] Important tasks of a chief or presiding judge in most trial courts include assigning judges and assigning cases to them, and in a large multi-judge trial court, chief judges face the problem of securing appropriate coverage for case types considered "unattractive" by many judges – high-volume and routine cases (such as traffic violations, collections, and small claims) and cases that can be especially taxing emotionally (such as domestic relations and child protection cases).[66]

In many medium-sized multi-judge trial courts, a chief judge must carry a full workload of cases in addition to performing administrative functions, and this can greatly affect the extent to which the chief judge can serve effectively as

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[63] In a federal court of appeal, the chief judge is selected by seniority. As with the state courts of last resort, the most common selection method is by the judges of the intermediate court itself (17 states). In 11 states, the selection is made by state court leaders (the chief justice or supreme court, or both), and in another state the supreme court ratifies the choice made by the intermediate court. The governor appoints the intermediate court chief judge in 7 states (with nomination by a merit selection commission in 2 of those states). Seniority is the method in 4 states, and in only 2 states is the intermediate court chief judge popularly elected. See *State Court Organization 1998*, Table 5.

[64] While every federal appeals court judge has a life term, no state intermediate court judge has such a term, and service is to age 70 in only one state. In the great majority of state courts (28), an intermediate appellate judge has a term of 6 or 8 years, and terms of office tend overall to be shorter than those in state courts of last resort. The chief judge of a federal appeals court serves in that position for 7 years or until age 70. The most common duration of service for the chief judge of a state intermediate court is two years, and in 23 states it is 4 years or less. The intermediate chief judge in almost all states (with the exception of 2) can succeed himself or herself in office. In 3 states, the intermediate chief judge serves at the pleasure of the chief justice or the court of last resort. See *State Court Organization 1998*, Table 5.

[65] Titles for the judges in such positions vary from state to state, including chief judge, presiding judge, administrative judge, president judge, assignment judge, chancellor, first judge, supervisory judge, senior judge, chief judge for administration, and chief magistrate. In four states, there is no judge in such a position; in other states, there are some levels of trial court in which there is no judge in such a position. In 18 states, chief judges generally receive more pay than their colleagues; but in 25 states they generally do not. There is a wide range of management matters that can be within the scope of a chief or presiding judge's authority, such as (a) supervision of non-judicial employees; (b) assignment of cases to judges; (c) assignment of judges; (d) requesting visiting judges; (e) selecting quasi-judicial officers; (f) supervision of fiscal affairs; (g) establishing special judge committees; (h) public relations; (i) maintaining statistics and management information systems; and (j) evaluation of court effectiveness. But few states give chief judges authority in all of these areas. *State Court Organization 1998*, Table 30.

[66] See David Rottman and William Hewitt, *Trial Court Structure and Performance: A Contemporary Reappraisal* (Williamsburg, Va.: National Center for State Courts, 1996), p. 84.

a court leader.[67] The means by which the chief judge of a trial court is selected can also have significant bearing on the manner in which he or she can in fact exercise the level of his or her formal administrative authority. Selection by his or her peers on the same court is the most common method for selecting a chief judge in a state or local trial court, although almost as many trial courts now have their chief judge appointed by state-level court leaders. Political selection of chief judges (either by gubernatorial appointment or by direct popular election) is relatively uncommon.[68] Partisan politics is consequently less likely to be a factor in the selection of a trial court chief judge than organizational politics within a court or a court system. To the extent that state-level court leaders select a chief judge, there is a greater chance of selection on the basis of leadership or management ability, although it still means that his or her colleagues must accept the appointed chief in order to be effective.

Only one state provides that a trial court chief judge can serve for life. Typically, a trial judge's term of service as chief judge is shorter than the term of office for a judge of that court, so that continued tenure as chief judge is subject to frequent review by those responsible for choosing the chief judge. In a federal district court, a chief judge cannot succeed himself or herself in that position. By contrast, the chief judge in almost all state trial courts can succeed himself or herself.[69]

The term of a chief trial judge is usually short, which can lead to discontinuity of leadership in the court. Moreover, chief judges in many trial courts serve at the pleasure of those who have selected them. A chief judge who has leadership and management skills must thus be willing and able in terms of bureaucratic politics to be chosen for more than one term in order to provide continuity and stability of leadership to the court.

2. Clerks of Court. Throughout U.S. history until the last half of the twentieth century, the traditional managers of court operations have been the clerks of court.[70] In the eighteenth and nineteenth centuries, with trial or appellate judges often riding circuit from one court location to another, clerks of court have been responsible for overseeing most day-to-day court operations.[71] Federal and state clerks of appellate courts are almost all appointed by the courts that they

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[67] Ibid., p. 85.

[68] States vary considerably in terms of trial court structure, with some having only one statewide consolidated trial court and others having a number of local county- or municipal-level trial courts. See the court structure charts in *State Court Organization 1998,* pp. 315-369. Methods for selection of a chief judge may vary within a state according to the level of trial court, and in some states there is local variation within the same level of trial court. Federal district court chief judges are selected by seniority, but that is now the selection method in only a minority of state trial courts (10). There are 38 courts where the chief judge is selected by colleagues. State-level court leaders (the supreme court, the chief justice, or the state court administrator) select the chief judge in 33 trial courts. Chief judges for 14 trial courts are selected by gubernatorial appointment. Chief judges are directly elected in only 2 trial courts. See *State Court Organization 1998,* Table 7.

[69] The most common term of office for a state trial judge is 6 years (48 trial courts) or 4 years (32 trial courts). In 23 trial courts, there are local variations within a state regarding a chief judge's duration of service, and in 20 others the chief serves at pleasure. Otherwise, the most common duration of service for a chief judge is 2 years (21 courts) or 1 year (18 courts). In 60 state trial courts, the duration of service as chief judge is shorter than a trial judge's term of office. See *State Court Organization 1998,* Table 7.

[70] Rather than having the title of "clerk," some of these officials are called "registers" or "prothonotaries."

[71] See Steven Hays, "The Traditional Managers: Judges and Court Clerks," in Hays and Graham (eds.), *Handbook of Court Administration and Management,* p. 221.

serve, and while some have a defined term of office, most serve at the pleasure of the appointing court.[72] This means that they almost always see the appellate court judges as their prime constituents.

Historically, trial judges have lacked interest and training in management, so that trial court clerks have handled court recordkeeping, supervision of court personnel, and most other day-to-day routine matters in state and local courts for the past two centuries. They have often had responsibilities relating to general county government as well as their court responsibilities. Often having a strong local political base, they could often place judges in the uncomfortable position of having an important court support role played by a person whose first loyalty was not to the court.[73]

Court management difficulties such as these between judicial leaders and clerks have led in many states to changes in the way that trial court clerks are now selected. While a majority of general-jurisdiction trial court clerks are still elected, almost as many are appointed by the court that they serve. An overwhelming majority of clerks in limited-jurisdiction courts are appointed by the judge or the court that they serve. Clerks chosen by election serve for a term of years, while those who are appointed may serve for a term of years or at the pleasure of the appointing authority. Trial court clerk's salaries are generally funded 100% by either state or local government, with clerks in only two states paid in part by the state and in part by local government. A number of clerks have their salaries paid by local government.[74]

In many states, judges have used their status, prestige and political power to induce clerks of court to be more responsive to judicial administration concerns. In addition, public-spirited elected clerks have on their own initiative recognized the needs of courts. Working with judges and court administrators, trial court clerks in many jurisdictions are becoming efficient and effective court managers. Large numbers of clerks are implementing strategies for improved management. In addition, they have joined professional associations with court administrators, regularly engaging in the same educational opportunities.[75]

3. Court Administrators. The creation of "administrator" positions to manage the affairs of courts is a development with its roots in the first half of the twentieth century, and the establishment of a body of professional court administrators is largely a phenomenon of the last three decades of the twentieth century.[76] One important dimension of court reform in the past 100 years has been the creation of an administrative structure to support the management of courts.

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[72] Appellate clerks are popularly elected in three states (Indiana, Montana, and – at the intermediate appellate level – Ohio). The governor appoints the appellate clerk in one state (Rhode Island). Appellate clerks serve a term of years in 9 states. See *State Court Organization 1998,* Table 24.

[73] See Robert Tobin, *Creating the Judicial Branch: The Unfinished Reform,* pp. 70-72; Steven Hays, "The Traditional Managers: Judges and Court Clerks," in Hays and Graham (eds.), *Handbook of Court Administration and Management,* pp. 230-231; and Larry Berkson and Steven Hays, "The Traditional Managers: Court Clerks," in Berkson, Hays and Carbon (eds.), *Managing the State Courts,* p. 175.

[74] Clerks are selected by partisan election for 33 general-jurisdiction trial courts, and by non-partisan election for 3. They are chosen by partisan election for 11 limited-jurisdiction courts. In 27 general-jurisdiction courts and 63 limited-jurisdiction courts, they are appointed by the court. Clerks for 13 limited-jurisdiction courts are appointed by local government officials. All clerks have 100% of their salaries paid by the state in 14 states, while all clerks are paid 100% locally in 15 states. In 19 states, clerks in some levels of court are paid 100% by the state, while those in other levels of court are 100% locally paid. See *State Court Organization 1998,* Table 31.

[75] Hays, "The Traditional Managers: Judges and Court Clerks," p. 233.

[76] See David Saari, Michael Planet, and Marcus Reinkensmeyer, "The Modern Court Managers: Who They Are and What They Do in the United States," in Hays and Graham (eds.), *Handbook of Court Administration and Management,* p. 237: See also, Harry Lawson and Dennis Howard, "Development of the Profession of Court Management: A History with Commentary," *The Justice System Journal* (Vol. 15, No. 2, 1991) 580.

a. State court administrators. At the request of U.S. Supreme Court Chief Justice Hughes, Congress created the Administrative Office of the U.S. Courts in 1939.[77] In 1948, the first state court administrator was appointed, and by 1980 every state had a state-level administrative director.[78] All state court administrators are appointed and serve at the pleasure of the chief justice or the court of last resort, or both. In 2001, four of them also held appointments as judges.[79]

The staffing and responsibilities of state court administrative offices vary considerably from one state to the next. While some have extensive responsibilities in support of trial courts, the scope of services that others can provide is circumscribed by such factors as funding limits on staffing and the degree to which there is centralized state-level administrative authority.[80]

b. Trial court administrators. There were no more than a handful of trial court administrators in the United States in the early 1960's. But by 1980, the National Association of Trial Court Administrators (NATCA) had 350 members.[81] In the year 2000, the National Association for Court Management (which was created when NATCA merged in 1985 with the National Association for Court Administration (NACM), an organization of court clerks) had about 2,500 members.[82]

In virtually all circumstances, trial court administrators are appointed by the courts and serve at the pleasure of the judges. All but 4 states report that they have administrators for at least some trial court levels. In 9 states, the state court administrative office makes the final decision on the selection of administrators at some or all trial-court levels. In 40 states, however, it is the trial court chief judges at some or all levels who make the final selection decision. In 26 states, all trial court administrator salaries are paid fully by the state, while all trial court administrators are paid fully by local governments in 11 states.[83]

The involvement of state court administrative offices in the selection of trial court administrators and the fact that many administrators are paid by the state indicates the degree of state-level investment in having management specialists in the trial courts. That most trial court administrators are chosen by trial court leaders, however, reflects the practical reality that an administrator is answerable on a day-to-day operational basis to the local trial court judges. The actual responsibility and authority of trial court administrators varies considerably from one court to the next.[84] In part this is a function of the extent to which trial judges understand and support the functions of a court manager.

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[77] See Larry Berkson, "A Brief History of Court Reform," in Berkson, Hays, and Carbon (eds.), *Managing the State Courts*, pp. 8-9.

[78] See Bureau of Justice Statistics, *State Court Organization, 1980* (Williamsburg, Va.: National Center for State Courts, 1982), Table 21.

[79] See Conference of Chief Justices and Conference of State Court Administrators, *Annual Directory 2001* (Williamsburg, Va.: National Center for State Courts, 2001).

[80] See *State Court Organization 1998*, Table 20.

[81] See Geoff Gallas and Edward Gallas, "Court Management Past, Present and Future," *The Justice System Journal* (Vol. 15, No. 2, 1991) 605, at 613.

[82] See National Association for Court Management, *2000 Membership Directory* (Williamsburg, Va.: National Association for Court Management, 2000). Not all NACM members are court administrators. Some members are clerks of court, some are court support staff members, a few are judges, and others are persons interested in trial court administration.

[83] See *State Court Organization 1998*, Table 32.

[84] Responses to a trial court administrator survey conducted in 1989 showed considerable variance in the courts that they served, in the nature of the positions they filled, and in their own personal backgrounds and characteristics. Survey researchers concluded that such diversity apparently was a result of the particular needs and expectations of local judges, vast differences in court size, and unique characteristics of various

E. Differing Views on the Importance of and Appreciation for Professional Management of the Courts. The extent to which the role of a court administrator has approached its fullest scope (including administrative and supervisory authority over court personnel, facilities, budgets, and management information, among other areas) has in part been due not only to the size of a court system, but also to the philosophical view of judges about court management, as well as the extent to which judges are willing to delegate authority to a court manager. The judiciary was slow to accept court administrators as responsible managers, often at first causing them to assume a passive role in the court process, serving largely as office managers.[85]

Because they typically have not been exposed to ideas of management in their education, judges traditionally have been suspicious of "administration," fearing that management will impede their individual judicial independence and cause a decline in the quality of justice and undermine fairness and due process. As a result, they would relegate administrators to a subordinate role unless they were faced with a crisis arising from serious deficiencies in court operations.[86]

Traditional views about administration have been changing, however. This has in part been a consequence of growing volume, growing complexity in the work of courts, and the dramatic impact of developments in information technology, which have dramatically changed the nature and scope of court administrator work.[87] In addition, judges have come to see the benefits of active and innovative court management, reaching the conclusion that more efficient management of caseflow and other elements of court operations allow them more time to do what they do best – adjudication of cases. Aided by educational programs offered by the Federal Judicial Center, the National Judicial College, the Institute for Court Management, and programs offered by state judicial educators, judges have become more accustomed to playing a more active and assertive role in the leadership and management of courts.[88]

F. The Joint and Individual Responsibilities for Leading and Managing the Courts. The demands of overseeing the operation of courts pose serious problems for judges in leadership roles. If the chief justice of a court of last resort devotes substantial time to administration of a court system, he or she finds this activity in conflict with the time

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jurisdictions. These factors also had considerable bearing on local legal culture, scope and directions of administrative policy, and the pace of organizational change. The survey results suggest further that the duties and responsibilities of trial court administrators have evolved over time, in part because of (a) growing professionalization; (b) bringing such expertise as budgeting, caseflow management, or automation technology; and (c) identification of diverse functions in courts as complex organizations. Three basic areas of trial court administrator responsibility appeared to be common: (1) operations (case management, calendaring, courtroom support, research, and program development); (2) fiscal services (budget, fiscal management, grant management, and planning); and special support services (jury, court reporters, interpreters, facilities, personnel, technology, probation, pretrial services, and security). See Saari, Planet, and Reinkensmeyer, "The Modern Court Managers: Who They Are and What They Do in the United States," in Hays and Graham (eds.), *Handbook of Court Administration and Management,* pp. 251-252.

[85] Steven Hays and Larry Berkson, "The New Court Managers: Court Administrators," in Berkson, Hays and Carbon (eds.), *Managing the State Courts,* p. 192.

[86] Hays, "The Traditional Managers: Judges," in *Managing the Courts*, p. 170, and Hays, "The Traditional Managers: Judges and Court Clerks," in Hays and Graham (eds.), *Handbook of Court Administration and Management,* p. 227.

[87] See Mark Zaffarano, "The Professional Court Manager: Have the Traditional Roles Changed?" *The Court Manager* (Vol. 3, No. 1, Winter 1988) 6, at 7.

[88] See, for example, Richard Matsch, "Court Management: Balancing People and Processes," *Federal Probation* (Vol. 60, No. 1, March 1996) 58, and Paul Wice, "Court Reform and Judicial Leadership: A Theoretical Discussion," *The Justice System Journal* (Vol. 17, No. 3, 1995) 309.

available for the more traditional appellate judge functions of making decisions and writing opinions. While an exceptionally vigorous person might seek to do both, her or she might face burnout unless there is an infrastructure for a person with average stamina. The chief justice may need more law clerk support, may need to take a reduced judicial workload, and must establish and maintain an effective working relationship with an able state court administrator.[89] He or she needs to distinguish functions that can only be done by a judge and what activities can properly be done by a state court administrator who is not a judge.[90]

At the trial court level, there are analogous considerations. Even if a trial court chief judge has ample authority to be a judicial leader and manager under constitutional and legislative provisions, he or she may be constrained the burdens of the trial court caseload. In many multi-judge courts other than the largest, the workload volume prohibits the chief judge from taking less than a full judicial workload, which has the necessary consequence of limiting time available for performing the administrative functions of a chief judge. As a result, it is critical for the chief judge work with colleagues, the court administrator, and other stakeholders in the judicial process to define the mission and goals of the court and to coordinate efforts with others to achieve those goals.[91]

Critical to the success of such efforts is the working relationship and division of responsibility between the chief judge and the trial court administrator. This reinforces the importance of a team approach to trial court management, with the chief judge and court administrator as key figures, and it also reinforces the importance of executive or management committees that bring members of the bench together regularly with heads of administrative units. The capacity of a court to perform well depends on the chief judge and court manager forming a team that can serve as a link between line staff and the bench and between the court and the outside world. Absent such a team, the traditional court unification agenda of consolidating benches and administrative functions cannot deliver improved court performance.[92]

IV. The Nature of the Judicial Process in the United States

In addition to structural factors, the judicial process itself affects the leadership and management of courts. There are at least three important ways that this occurs. One is through the nature of the adversarial nature of the common-law process. The second is the fragmentation inherent in the process. The third has to do with the fact that adjudication actually has different styles, each with its own management demands.

A. Adversarial Process. The judicial process in state and federal courts is lawyer dependent, based on the assumption that truth will be found when opponents present their positions to an impartial arbiter, and it is unlikely that court dependence on the performance, availability, quality and attitudes of lawyers will change.[93] The traditional view of the adjudication process was that judges should play a passive role, letting the attorneys move cases or delay them for

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[89] See Jack Weinstein, "The Role of the Chief Judge in a Modern System of Justice," in Russell Wheeler and Howard Whitcomb (eds.), *Judicial Administration: Text and Readings* (Englewood Cliffs, N.J.: Prentice-Hall, 1977), pp. 144-148.

[90] See Edward McConnell, "The Role of the State Court Administrator," Wheeler and Whitcomb, *Judicial Administration,* pp. 155-156.

[91] See Matsch, "Court Management: Balancing People and Processes," 58-59; see also, Bryan Borys, Cynthia Banks, and Darrell Parker, "Enlisting the Justice Community in Court Improvement," *Judicature* (Vol. 82, No. 4, January-February 1999) 176.

[92] See David Rottman and William Hewitt. *Trial Court Structure and Performance: A Contemporary Reappraisal,* pp. 85-86.

[93] Ernest Friesen, "Constraints and Conflicts in Court Administration," in Berkson, Hays, and Carbon (eds.), *Managing the State Courts: Text and Readings,* p. 39; Malcolm Feeley, *Court Reform on Trial: Why Simple Solutions Fail* (New York: Basic Books, 1983), p. 11.

reasons sufficient to themselves, and that more active engagement by a judge in the progress of a case would compromise the disinterested neutrality of the judge.[94]

But this has slowly changed since the 1970's, with the development and empirical testing of caseflow management techniques.[95] A more contemporary attitude among judicial leaders, individual judges, and court managers is that the court must control the pace of litigation, and that the judicial process cannot be left to the convenience or special interest of the attorneys in a case.[96] Recognizing that the adversary, witness-oriented process diminishes in effectiveness with the loss of memory and disappearance of witnesses, many judges today resist traditional deference to lawyers in moving cases to conclusion.[97]

Many management problems for courts grow out of adversary process, in which lawyers' tactics involve surprise and concealment despite rules of discovery. The assignment of cases for trial puts lawyers and court in a game, where each lawyer seeks to gain tactical advantage.[98] The ultimate result, however, is that about 19 of every 20 cases are resolved by plea or settlement before trial. Basic caseflow management practices are directed toward early achievement of negotiated outcomes, providing and managing trials where they are needed, and managing cases after initial disposition.[99] Such practices are intended to reduce room for maneuvering by trial attorneys and to increase judicial effectiveness.

Trial attorneys can play a significant role in defining the work patterns of trial judges, with an attendant effect on the use and allocation of judge time by judicial leaders and managers.[100] The contentiousness of attorneys influences the amount and kind of work that judges will do. Highly contentious attorneys provoke more and longer motions hearings and jury trials. Judges also respond to the work skills of attorneys, at least as they perceive them, in selecting which tasks to emphasize in their work. Sometimes judges do work to compensate for the inadequacies of civil attorneys, as in drawing up decrees, judgments, and orders. In other instances, judges draw on the strengths of civil attorneys by emphasizing settlement or trial work where they perceive attorneys to be so skilled. Finally, judge work is shaped by the level of familiarity, or stability, of attorney members in the work group. The differences are more marked on the criminal side, where the balance among plea negotiations, non-jury trials, and jury trial work slowly tilts toward methods of quick disposition after attorneys have been assigned to a courtroom for some time and have established routine patterns and expectations with each other and the judge.

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[94] A notable legal academic critic of active case management by judges was Professor Judith Resnik, in her article entitled, "Managerial Judges," *Harvard Law Review* (Vol. 96, December 1982) 374, which was also published as a monograph (Santa Monica, Calif.: Rand Corporation, Institute for Civil Justice, 1982).

[95] See David Steelman, "What Have We Learned About Court Delay, 'Local Legal Culture,' and Caseflow Management Since the Late 1970s?" *The Justice System Journal* (Vol. 19, No. 2, 1997) 145.

[96] In support of active caseflow management by courts, Richard Hoffman recently challenged the views expressed by Resnik and other legal academics in his article, "The Last Frontier: Optimizing Court Management Despite Legal Academe," *The Court Manager* (Volume 16, No. 1, 2001) 9.

[97] See the presentation on caseflow management and the purposes of courts by Ernest Friesen in *Caseflow Management Principles and Practices: How to Succeed in Justice* (a videotape prepared by the Institute for Court Management of the National Center for State Courts in 1991).

[98] Friesen, Gallas, and Gallas, *Managing the Court,* p. 48.

[99] See Steelman, Goerdt, and McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium,* pp. 3-33.

[100] See Ryan, et al., *American Trial Judges,* pp. 97-98.

Another consideration arising from the adversarial process and affecting court management involves issues of supply and demand for trial lawyers. In any given jurisdiction, the number of institutional lawyers (prosecutors and public defenders) involved in most criminal cases is usually limited. While civil and domestic relations cases may involve a wider group of lawyers, it is common in all trial courts for a large amount of trial litigation to be concentrated in the hands of a comparatively small number of attorneys. This usually creates scheduling problems for courts.[101]

B. Fragmentation of the Process. In addition to the fragmentation of court process caused by the professional norms of attorneys (see section III.B above), the judicial process is fragmented by other factors. These include the fact that most participants in the process are not under the direct control of the court, as well as the fact that due process promotes fragmentation.

1. Participants not under court control. A critical element of the adjudication process in courts is that it involves participants from different organizations. While the court in the context of a case can order the appearance of other participants, the scheduling of court events and the implementation of policy must typically involve consultation and coordination with institutional participants – prosecutors, public defenders, private attorneys, police, sheriffs, court reporters, and others – whose purposes, while related, are not identical to those of the court.[102] While a judge might order participants in any particular case to appear in court subject to penalties, the fact that the progress of cases to conclusion requires coordination of the schedules of different participants makes the scheduling of court events complex. Beyond that, any changes in the manner in which the case process is carried out can only partially be made by the court through rules and administrative orders. The successful implementation of any such changes may be quietly defeated by any of the participants absent substantial communication and coordination by judicial leaders and managers with representatives of the other institutional participants in the court process.[103]

2. Impact of Due Process. One commentator has observed that one of the animating features of due process is a fear of authority and a concern about potential abuse of power by the state.[104] The purpose of the court is to stand between the state and the individual citizen, to ensure that action is not taken by the state against the liberty or interests of a citizen, without due attention to basic notions of fairness. As a result, the application of the Bill of Rights in criminal proceedings requires that the prosecutor acting on behalf of the state meet strict formalities regardless of a defendant's actual guilt in order to achieve a conviction. While such procedural formality increases fragmentation, the wide discretion of participants in the criminal process – of prosecutors whether to charge, of defendants whether to waive rights, and of the court to impose sanctions – also promotes fragmentation. In criminal cases, such fragmentation complicates the management of the judicial process and limits the extent to which the process can be streamlined to achieve just outcomes in individual cases.

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[101] See Friesen, Gallas, and Gallas, *Managing the Courts,* p. 64.

[102] According to Malcolm Feeley, court operations can be seen to involve a multiplicity of "games," in that judges, prosecutors, defense attorneys, defendants, clerks, police officers, bailiffs, sheriffs, bondsmen, witnesses and others come to the courthouse with distinctly different interests and purposes and may understand their participation in process in entirely different ways. Police are involved in a "public order" game, responsive to citizen complaints about domestic violence, public disturbances, and personal safety. Prosecutors are involved in "public order" and "civic virtue" games. Defense attorneys play a variation of the prosecutors' game, using procedure and rules to obtain the most desirable outcome. The court process thus involves a collection of individuals who, while sharing common concerns and interests and knowing they must work together to process criminal defendants, are also engaged in a variety of other enterprises not formally acknowledged in the law. See Feeley, *Court Reform on Trial: Why Simple Solutions Fail* (New York: Basic Books, 1983), pp. 10-11.

[103] See Steelman, Goerdt, and McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium,* pp. 97-101 and 180-182.

[104] Ibid., p. 11.

C. Varieties of Adjudication Styles. In 1984, researchers assessing trial court unification suggested that the adjudication process in state and local trial courts is not uniform, but involves three different varieties – procedural, decisional, and diagnostic.[105] Because these different adjudication styles have different resource needs, they have differing support needs and pose different problems for judicial leaders and managers.

"Procedural adjudication" is what we typically see in felony criminal cases and in serious civil cases, and it emphasizes adherence to established rules and procedures to ensure just resolution of a case. "Decisional adjudication" is more common in traffic court, and it is designed to establish facts in a case so that the law can be applied as quickly and directly as possible. "Diagnostic adjudication" is what we see in juvenile cases, and it is often "adjudication" in name only, since its objective of diagnostic adjudication is to identify the problems that are the source of a dispute or that require court action for the protection of the parties and the society.[106]

These three different approaches to adjudication have substantially different court management implications.[107] "Procedural adjudication" is something for which a judge may need little direct administrative support in order to be effective, although legal research assistance may be desired. For this reason, a court dominated by this type of adjudication operates as a loose coalition of independent offices rather than as a closely-knit, coherent organization. Each judge tends to work in isolation from colleagues on the bench.

The character of "decisional adjudication" leads to a high demand for administrative support and close contact between judges and administrators. Judges in multi-judge courts dominated by decisional adjudication are more likely to have regular contacts with colleagues and be subject to direct supervision of their day-to-day activities. This is because decisional adjudication emphasizes quick and direct resolution of cases, with a high case turnover and a premium on effective flow of paper and people through the courtrooms. High case turnover places a premium on effective coordination of judges, administrators, defendants, lawyers (when present), paper flow, and courtrooms. These courts have the most elaborate management activities, even in the absence of formal authority for such activities. In a multi-judge court, the chief judge is likely to take an active part in assigning cases and courtrooms among judges, monitoring judge performance, and trying to create circumstances for effective performance. The pronounced need for administrative support services encourages a relationship between the chief clerk or trial court administrator and the judges that is very different from that in a court dominated by procedural adjudication. Judge and manager view each other two specialists doing mutually reinforcing jobs. The status differential between the manager and the judge is much less than that in a court dominated by procedural adjudication.

"Diagnostic adjudication" has high needs for administrative services. The most important component of the process is the development of a remedy to the problem that has been identified. This emphasis on outcomes means that the court may need access to a range of services at the time of disposition. In addition, many cases are heard *pro se* in diagnostic adjudication, so that judges must rely on administrative staff to provide information needed for an appropriate diagnosis. In this setting, the administrative services provided by the court are often more important to the outcome of the process than the judge is. Indeed, many of these cases never reach a judicial hearing, being instead resolved by a probation intake officer or a caseworker with the concurrence of all parties, or by a quasi-judge.

D. Trial by Jury. One of the most notable features of the common law judicial process in the U.S. is a litigant's right to trial by jury. While trials by jury have been sharply limited in England, the jury right is so firmly entrenched in the U.S. legal tradition that it is unlikely to be eliminated. While jury trials actually occur in five percent or less of all cases in

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[105] Thomas Henderson and Cornelius Kerwin, *Structuring Justice: The Implications of Court Unification Reforms. Policy Summary*, pp. 8-13.

[106] Ibid., pp. 9-13.

[107] Ibid., pp. 70-75.

trial courts, they consume a great deal of trial judges' time: it has been estimated that many trial court judges spend from one-third to one-half of their work time conducting jury trials.[108]

Jury trials have a significant impact on trial court management, since they consume so much time of judges, and since they require an extensive set of management practices and procedures.[109] For court leaders and managers, the existence of the jury right requires (a) allocation of judge resources to provide a basically continuous hearing in a given case, and (b) the administration of a program to find impartial jurors. Trying a case with a cohesive team of jurors over any protracted period of time must overcome such difficulties as sickness, death in the family, jobs, and other factors. Finding impartial jurors involves summoning hundreds, examining them, letting some be excused, and sending them to a trial room for screening by lawyers. The fact of jury trials is another dimension of the fragmentation of the judicial process. Jurors are not employees of the court, and their incentives for performance are different from those of employees generally.[110]

Keeping a pool of jurors over a period of time traditionally meant that many had to wait for days without being used. The fact that a poorly run jury management system creates considerable human waste and social cost has led court leaders and managers to develop "one day/one trial" systems and other methods to manage the creation and management of jury pools.[111]

V. Conclusion

As the discussion in this paper suggests, there are many things about state and federal courts in the United States that present challenges for judicial leaders and court managers. Prominent among these are the effect of separation of powers and judicial independence on court funding and resources; the kinds of people who become judges and the manner in which they are selected; the effects of legal and professional norms; and the ways that court leaders and managers are chosen. Judges and managers have made remarkable strides in meeting these challenges in recent years, creating a true judicial branch of government by introducing means for management and accountability in the courts.

Yet the nature of the reality facing the courts is that new challenges are being forcefully presented to judicial leaders and court managers even as they make progress in overcoming traditional shortcomings. One aspect of leading and managing any organization involves willingness and capacity to modify its structure and operations to ensure that organizational purposes are being met in the face of evolving circumstances. One of the challenges that faces leaders and managers is organizational resistance to change. Courts in the United States serve as a force for stability and predictability in society by relying on established norms and rules of social behavior and emphasizing the importance of precedent as articulated in prior court decisions.[112] While courts have been a force for change in U.S. society in the

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[108] See Steelman, Goerdt, and McMillan, *Caseflow Management: The Heart of Court Management in the New Millennium*, p. 17, citing Brian Ostrom and Neal Kauder (eds.), *Examining the Work of State Trial Courts, 1996* (Williamsburg, Va.: National Center for State Courts, 1997), pp. 25, 30, and 57.

[109] See Ernest Friesen, "Constraints and Conflicts in Court Administration," in Berkson, Hays, and Carbon (eds.), *Managing the State Courts: Text and Readings*, pp. 40-41.

[110] See Dale Sipes and Mary Oram, *On Trial: The Length of Civil and Criminal Trials* (Williamsburg, Va.: National Center for State Courts, 1988), p. 69, where the authors report their finding that judge control over attorney questions in jury selection is a key way to shorten trial times. Adoption of judge control over jury selection has been far from universal, however, because of resistance from attorneys and judges.

[111] On methods for managing the jury process efficiently, see G. Thomas Munsterman, *Jury System Management* (Williamsburg, Va.: National Center for State Courts, 1996).

[112] Steven Hays has observed that the peculiar nature of the American legal establishment, with its emphasis on precedent making courts perhaps the most traditional and static of all public institutions,

twentieth century, promoting government recognition of the rights of individual citizens, their role as a source of social stability has traditionally created an atmosphere that making it difficult to introduce changes in management and operations.[113]

The evolution of improved management and delivery of justice that courts have sought in the last half century have enabled courts to overcome some of their traditional resistance to change. With enhanced capacity to manage their own affairs, the courts will face new challenges that will require further changes in the way that courts operate.

There are broad social, economic and technological trends underway in society that will present an ongoing requirement for court leaders and managers to develop new strategies for the effective and efficient delivery of justice. Researchers and management planners have identified the following eleven trends that will be important to courts regardless of their size, whether they are urban or rural, and whether they serve wealthy or poor communities:[114]

(1) Increasing demand for culturally appropriate court and justice services for Latinos, Asians, Middle Eastern, and other ethnic groups;
(2) Increasing number of diverse expectations for courts' role in society;
(3) Alterations in family composition, including declining numbers of traditional families and alterations in role of societal institutions and community norms and values;
(4) Polarization of people by class, race, ethnicity, and lifestyle preferences;
(5) Increasing demand for acceptance of alternative lifestyles;
(6) Increasingly sophisticated manipulation of public opinion about crime and courts using mass media;
(7) Growing shortage of court administrators and staff;
(8) Increasing reliance on therapeutic approaches to court and justice service provision;
(9) Increasing demand for justice system performance accountability;
(10) Emerging revolution in legal service provision, including bundling of legal, accounting, management, and financial services; and
(11) Rapidly emerging information, telecommunications, and networking technology.

If courts respond to these challenges in their traditional fashion resistive to change, the researchers and management planners identifying these trends suggest that they will become increasingly isolated from other institutions in the justice process, increasingly at odds with them, and facing declining resources. The challenge facing judicial leaders and court managers in the face of these trends will be to undertake a strategic planning effort to work in more integrated fashion within the court system and in collaboration with their partners in the justice community to create a more positive future through implementation of steps in the following general areas:[115]

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serves as an obstacle to efficient administration. Judges and attorneys may often want to retain the status quo, since changes might call for them to re-educate themselves and change their operating methods. Hays, "The Traditional Managers: Judges," in Berkson, Hays and Carbon (eds.), *Managing the State Courts*, p. 171.

[113] Ronald Stupak has observed that the investment of courts in the constitution and "justice" has a potential side effect of making them backward-looking entities. He observes that the legal profession's domination of the mindset of court leaders means that courts are destined to be suspicious of dynamic change processes, instead of being "proactively ahead of the power curve," so that they might control their environment rather than being pushed or dragged by it in certain directions. The law's reverence for precedent and confidence in established customs poses limits on the pace and nature of change in courts. Yet technology and stakeholder involvement in decisions are among the criteria demanding performance in judicial productivity, and courts cannot continue to wait until "something is broke before they fix it." Stupak urges judicial leaders to act strategically, consciously, proactively, and flexibly to move ahead and create new judicial paradigms, both substantively and managerially. See Stupak, "Court Leadership in Transition: Fast Forward Toward the Year 2000," at 620-621.

[114] John Martin and Brenda Wagenknecht-Ivey, "Courts 2010: Critical Trends Shaping the Courts in the Next Decade," *The Court Manager* (Vol. 15, No. 1, 2000) 6, at 6-12.

[115] Ibid., pp. 13-15.

- Implementing a variety of mechanisms for working effectively with diverse stakeholders at the state and local level, to clarify the role of courts as opposed to that of executive branch agencies, identifying appropriate areas of collaboration through the development of programs providing outreach and participation for diverse ethnic and racial groups;
- Developing an enhanced court governance structure contributing to improved administrative efficiency, with increased emphasis on maintaining a quality justice system, with mechanisms to monitor and report on justice system performance;
- Initiation of court personnel recruitment, training and career development efforts directed toward assuring the ongoing presence of a court workforce that is well trained, well motivated, ethnically and racially diverse, and oriented to public service;
- Development of a decentralized approach to provision of justice services at diverse sites throughout the community; and
- Effective acquisition and use of technology to promote access to justice and enhanced court productivity.

Some courts are already beginning to work in the manner suggested here, through both internal collaboration among court units and through collaboration with other institutional partners in the justice process.[116] As Henry Mintzberg observed, our nation cannot afford anything but strong government, and both government and private business have much to learn from collaborative enterprises. People in the courts and other elements of the public sector must cope, he suggests, with conflicting objectives, multiple stakeholders, and intense political pressure.[117] The courts have long focused on judicial independence and ensuring "a government of laws and not of men." The challenge facing judicial leaders and court managers as the new millennium unfolds is to enable courts and the law to progress beyond being independent and autonomous to being *responsive* – offering more than procedural law, courts must provide law that is competent as well as fair, helping to define the public interest and being committed to the achievement of substantive justice in a diverse and complex society.[118]

[116] See, for example Matsch, "Court Management: Balancing People and Processes," 58, as well as Borys, Banks, and Parker, "Enlisting the Justice Community in Court Improvement," 176.

[117] Mintzberg, "Managing Government, Governing Management," *Harvard Business Review* (May-June 1996) 75.

[118] See Phillipe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Harper & Row, 1978), pp. 18, 53, and 73-74.

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