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Essays from the Bench (Introduction)

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Introduction: Essays from the Bench

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The roots of the judicial system run deep — as far back as our nation's beginning. From the first it has been multifaceted: philosophical, practical, theoretical. Always, however, it has been instrumental in building our nation and shaping our institutions.

The contents of this Colloquium touch a variety of topics concerning the judicial system. In the philosophical vein, the impact of the judiciary on present day institutions is explored.[1] On a practical level, information on the preparation for, and trial of, civil cases is provided to guide the new lawyer and to remind the old.[2] Lastly, past theory, having become reality through the culmination of years of study, is presented in an examination of legislation aimed at implementing the important right of access to our courts.[3]

Today the role of the judiciary is expanding as never before. Judges are becoming more active in both the structuring of their own court responsibilities[4] and in the area of constitutional adjudication.

It has been said that the substantive constitutional issues of each period reflect its central political questions.[5] Thus, the problems faced by the country in any era are eventually carried to its courts, as judges are well aware. Adjudication is becoming a more complex process. Standing to sue has been expanded.[6] The use of class actions is increasing and with it the number of members whose rights must be adjudicated and, concomitantly, the scope of

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[1]Bazelon, *The Impact of the Courts on Public Administration*, 52 IND. L. J. ____ (1976), *infra* [hereinafter cited as Bazelon].

[2]Richey, *A Federal Trial Judge's Reflections on the Preparation for and Trial of Civil Cases*, 52 IND. L. J. ____ (1976), *infra*. For a more theoretical view of the advocate's role see Lambros, *American Advocacy — Foundation of the American Dream*, 52 IND. L. J. ____ (1976), *infra* [hereinafter cited as Lambros].

[3]Bonsal, *The Criminal Justice Act — 1964 to 1976*, 52 IND. L. J. ____ (1976), *infra*.

[4]In the past dozen years judicial activism in the trial courts has produced new techniques in jury selection and the growth of pretrial conferences and orders, both of which expedite jury and nonjury trials. The extensive use of pattern jury instructions has also proved beneficial to both judges and counsel.

At the appellate level, judges are exploring the merits of oral decisions from the bench, the use of short unpublished opinions which have no precedential value, and the imposition of time limitations on oral argument and prehearing conference. Such conferences have been used to require counsel to consider the simplification of issues and various settlement possibilities before they invest further time and resources in pursuing an appeal to a court with a heavy backlog of pending matters.

[5]Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791 (1976).

[6]*Compare* Tennessee Power Co. v. TVA, 306 U.S. 118 (1939), *with* United States v. SCRAP, 412 U.S. 669 (1973). *But see* Simon v. Eastern Ky. Welfare Rights Organization, 96 S. Ct. 1917 (1976).

the remedy imposed.[7] Interpretation by court decision is the key to the meaning of those rights.

The results of such interpretation are becoming more comprehensive, however. Rather than merely blocking legislative initiatives, changes in the established legal order are now being mandated. More and more courts are imposing affirmative duties, ordering reforms which necessitate on-going action. These include desegregation decrees,[8] reorganization of state institutions[9] and, occasionally, decisions setting forth comprehensive guidelines.[10]

This may be partially the result of what Judge Bazelon identifies as the due process revolution[11] which has fueled the expansion of court activities. But courts cannot always make their prescribed remedies happen, nor can they always claim scientific or technical expertise in a complicated case. What function then can the court serve? As Judge Bazelon indicates, even in such cases judges can monitor the decision making process for thoroughness, completeness and rationality.

Counsel can help in this process by being prepared, well versed in the law and facts and cognizant of their continuing duty to improve our system of justice.[12] Judge Richey's article and its appendices should be helpful to

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[7]One recent example is Rizzo v. Goode, 423 U.S. 362 (1976), a class action on behalf of all citizens of Philadelphia to force complete revision of police practices in the city and establishment of procedures for handling citizens' complaints of police misconduct. The district court directed defendants to draft a "comprehensive program for dealing adequately with civilian complaints" and formulated guidelines to help the process. 357 F. Supp. 1289, 1321 (1973).

Although the Supreme Court subsequently reversed the judgment, the decision can be confined to its facts, which include a number of violations too small and too scattered to support a finding of higher officials' indifference to citizen problems. Under this reading, *Rizzo* indicates the potential for continuing judicial supervision of an executive department. Even under another reading, the case exemplified the willingness of the district court and court of appeals to become involved in adjudicating the rights of all members of the class.

[8]Such decrees, beginning with Brown v. Board of Educ., 347 U.S. 483 (1954), have continued with the orders relating to Boston public schools following the decision in Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass. 1974).

[9]United States District Judge Frank Johnson, for example, heard a class action suit aimed at compelling a reorganization and improvement of services at Bryce Hospital, a mental health facility in Alabama. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *hearing on standards ordered,* 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced,* 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

He entered a long, detailed order for the operation of the physical facilities and the conduct of the medical program, including the temperature of the hot water system and the numbers of medical and supporting personnel for each job classification. 344 F. Supp. at 374, 382.

Similarly, federal courts have required the rewriting of prison rules and the reconstruction of local prison facilities. See Gates v. Collier, 390 F. Supp. 482 (N.D. Miss. 1975), *aff'd,* 525 F.2d 965 (5th Cir. 1976); Inmates of the Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973).

[10]One of the best known examples is perhaps Miranda v. Arizona, 384 U.S. 436 (1966).

[11]Bazelon, *supra* note 1, at 103.

[12]Lambros, *supra* note 2, at 130-32. The American Bar Association Commission on Standards of Judicial Administration has completed a tentative draft of Standards Relating to Appellate Courts which deals also with questions concerning assistance of counsel. See Hazard, *Standards of Judicial Administration: Appellate Courts,* 62 A.B.A.J. 1015, 1017 (1976).

counsel in this respect, providing a guide to adequate trial preparation and reminding them of the essentials of proper courtroom decorum. State and federal trial judges will also find some valuable and very practical tips on trial techniques.

Although we live in changing times, some things remain unchanged. One of them is the "duty of the court, unimplemented by much doctrinal or other verbal machinery, but there, live, throbbing like a heart: the felt duty to justice which twins with the duty to law."[13] This Colloquium, the *Journal's* second effort to feature the federal judiciary,[14] was intended to provide the opportunity for informal discussion from the members of the federal bench of some of the important problems and developments of the judiciary. This collection of essays will flesh out the concept of the "felt duty to justice" by exploring the judiciary's past, its present, and its future. That courts change at all is evidence of the always essential flexibility which accompanies any enduring institution; that they can change in a progressive manner is the essence of their success and a guarantee for continued freedom.

[13]K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 121 (1960).

[14]*See* Symposium, *Problems of the Federal Judiciary: A View from the Bench*, 51 IND. L. J. 293 (1976).