

JUDICIAL ETHICS AND THE POLITICAL ROLE OF THE COURTS

RONDAL G. DOWNING*

The sense of malaise that settled over much of America during the last part of the 1960s appears to be broadening and deepening as we enter the 1970s. Unease continues to be reflected in the attitudes that Americans have toward their nation, its problems, and its prospects for the future. These attitudes alone constitute a problem of formidable dimensions reflecting as they do a widespread lack of confidence in virtually every American institution, especially political and governmental institutions.

But the crisis goes beyond mere doubts about the efficacy of our public institutions. Additional dangers are created by the tendency of millions to seek escape from their anxieties through efforts to find simple explanations for the system's problems, or through efforts to single out one group or institution that can be blamed for our troubles. Even those capable of some measure of objectivity find little cause for optimism. Increasing numbers of academicians and intellectuals contend that the system is ill-equipped to cope with its problems; many concur in the judgment that, as presently constituted, our political and governmental institutions and processes lack the capacity for handling many of the tasks that confront them.¹ The resulting crisis is easily the most severe the nation has faced since the Great Depression of the 1930s; in most respects it is probably far more serious, since the issues dividing us are more emotionally charged, the sources of our problems more diffuse, and the problems themselves less tractable.

Nor have our courts escaped the spreading virus of doubt affecting our political institutions. Dissatisfaction with the decisions of the judiciary, particularly those of the United States Supreme Court, has drastically reduced the level of confidence in the courts and the judicial process among many segments of the public. Disillusionment with the courts is also heightened by the growing inclination for many of those involved in judicial proceedings to flaunt their disrespect for the judiciary, and to refuse to abide by the standards of decorum and propriety that have heretofore been assumed to be the *sine qua non* of the judicial process.

Speaking for what is undoubtedly an overwhelming proportion of the bench, bar, and public, Chief Justice Warren E. Burger has called for new rules of courtroom behavior that would "eliminate some of the spectacles that are undermining

* Professor of Political Science and Acting Director, School of Business and Public Administration Research Center, University of Missouri-Columbia. With R. Watson, Professor Downing co-authored *THE POLITICS OF THE BENCH AND THE BAR* (1969).

¹ See T. LOWI, *THE END OF LIBERALISM* (1969). See also A. HACKER, *THE END OF THE AMERICAN ERA* (1970); S. LUBELL, *THE HIDDEN CRISIS IN AMERICAN POLITICS* (1970).

public confidence in the whole [judicial] system.”² This aspect of the problems facing American courts is exemplified by several recent court proceedings, but is perhaps no better epitomized than by the trial in 1969 and 1970 of the so-called Chicago Seven. This trial was originally billed as a test of the 1968 Civil Rights Act provision making it a federal offense for individuals to cross state lines with the “intent” of inciting a riot. For quite different reasons, the trial very quickly became a landmark in the history of judicial proceedings, vividly pointing up the fragile, delicate nature of the judicial process, and demonstrating how vulnerable that process is to the disruptive behavior of those who have no regard for the rules of procedure and etiquette normally expected in American courts of law.

From the outset of this proceeding, it would appear that the defendants were determined to test the limits of judicial tolerance. Their obstreperous conduct, mockery of the judge, and refusal to pay homage to courtroom rules tore at the very vitals of the judicial process; all seemingly were motivated by the conviction that they were involved in a travesty of justice, a politically inspired persecution designed to punish them for their political beliefs.

Questionable conduct by the defendants and their counsel was matched by many aspects of the trial judge’s behavior. The judge took few pains to conceal his contempt for both the defendants and their attorneys. In response to admittedly repeated disruptions and provocations, the judge ordered one of the defendants bound and gagged while the trial proceeded. This together with many other less dramatic but equally disdainful acts by the trial judge led many to the conclusion that his conduct was patently biased against the defense.

The Chicago Seven trial glaringly exposes fundamental weaknesses in our judicial process, revealing particularly its limitations for coping with those who dare to carry the politics of incivility into the courtroom itself. What is to be done in the case of defendants who display their contempt for the judge, the court, and the law through defiant words or gestures, or through noncompliance with the expected code of behavior? What hope can there be for coping with such displays of behavior when the bench responds in kind, making no effort to mask its distaste for the defendants or the values for which they stand?

Chief Justice Burger surely is right when he says that means must be found for eliminating such episodes from judicial proceedings. But no simple changes in court procedures are apt to solve the problem; nor will restoration of courtroom decorum go very far toward renewing public confidence in the courts. For these problems are in many respects quite superficial, symptomatic only of much more basic factors that have brought about the erosion steadily eating away at the foundations of the judicial process.

Certainly the militant, “anti-establishment” political element in our society will not have its faith in the courts restored by procedural reforms. Until very recently,

² St. Louis Post-Dispatch, Aug. 8, 1970, at 1-3, col. 1A.

most political dissidents had much greater faith in the judiciary than in any other agency of government, largely as a result of the Supreme Court's stands on matters of racial segregation and civil rights. The role of the courts in curbing disorders, protests, and demonstrations, on both the campus and in the cities, eventually led most political activists to the conclusion that the judiciary could not be trusted either, that it was merely another establishment instrument for "riot" control and the repression of political dissent.³

The courts are thus caught in a damaging cross-fire. Political militants, among those most in need of the protections that can be afforded by the judiciary, knowingly ridicule the procedures that are the essence of the judicial process. They do so partly because they feel that the procedures themselves often lack the neutrality claimed for them, serving instead to favor litigants who identify with the status quo. Political dissidents also believe that many of those who operate the procedural machinery (the judges) are hopelessly biased against them at the outset. They are correct on both counts, but err when they convert these observations into the proposition that all courtroom ritual, ostensibly designed to insure neutrality and objectivity of the bench, is mere sham designed to obscure the fact that the legal "game" is fixed so that they can not possibly win.

Every time there is a disruption of courtroom proceedings by political militants, whether blacks or leftists, millions of other Americans recoil in disgust. Every incident feeds the demand for "law and order," the insistence upon respect for legal institutions, including the courts. Political conservatives, in particular, tend to lay very great stress upon the importance of restoring the dignity of the judicial process. Respect for the agents of law and order, the police and the judges, is the foundation of societal order in their estimation. When they lament the disrespect shown our legal institutions, the conservatives forget that only yesterday *they* were throwing vitriol on the courts, secretly agreeing with the "impeach Earl Warren" slogan, and openly advocating (and in some cases practicing) disobedience to court orders. Even such venerable groups as the Conference of State Chief Justices and the American Bar Association joined in the attacks upon the Supreme Court, publicly rebuking the Court and charging it with having exceeded its legitimate powers and role.⁴ Little wonder, then, that young political activists should so readily gravitate toward displays of contempt for our judicial institutions. They are simply following precedents established by the most respected groups in society, but applying them in the carping, histrionic manner that so typifies their own political style.

Yet, the problems besetting our courts would not be reduced appreciably, were

³ J. SKOLNICK, *THE POLITICS OF PROTEST* 316-24 (1969) (A Task Force Report submitted to the National Commission on the Causes and Prevention of Violence).

⁴ W. MURPHY, *CONGRESS AND THE COURT* 224-25 (1962). For many Americans, Barry Goldwater's 1964 presidential campaign also gave legitimacy to the position that it is honorable, sometimes very commendable even, to disobey U.S. Supreme Court decisions. See R. HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 99-100 (1967).

the leftist-oriented and black political militants suddenly to disappear from the American political scene. For the issues that have produced the greatest strains upon our judicial institutions would remain. As long as those issues retain their paramountcy in our politics, the courts will probably continue to be drawn into politically troubled waters. To expect otherwise requires several very large assumptions, including the assumption that the courts will come to play a fundamentally different role than they now have in the American system. Any expectation of political surcease for the courts implies an even more improbable assumption—the assumption that our entire governmental-political system will be transformed in such a way as to increase the capacities of the executive and legislative branches to cope with the system's problems.

Justification for these conclusions requires further elaboration upon three propositions: (1) the assertion that contemporary political controversy surrounding the judiciary is largely a consequence of the types of political issues that currently dominate our political life; (2) the idea that these issues come to be thrust upon the courts, in part, because of the unique role of the courts (particularly the Supreme Court) in our political life; and (3) as a corollary of this second proposition, the contention that the courts assume such a role largely because of the default of our other governmental institutions. These themes will be dealt with in the following section, to be followed by a third section examining the consequences that these features of the judiciary's role have for issues relating to judicial ethics. Implicit in this order of presentation is the assumption that questions relating to norms of judicial conduct can not be answered until we understand the role of the judiciary in our political-governmental system, the nature of the demands made upon the judiciary, and the sources of support that it has.

II

Since *Brown v. Board of Education* in 1954, some of the most divisive, emotion-laden issues arising within American society have been repeatedly thrust upon the courts for resolution. Save for the Vietnam War, the list of causes dealt with by the courts sounds like a roll call of all the conflicts that have produced such extreme fragmentation and vituperativeness in recent American politics: racial discrimination; racial segregation in public education, transportation, and housing; issues of free speech, political belief, association, and participation in areas deemed to impinge heavily on internal security; the extent to which political protests, demonstrations, and other tactics of confrontation politics are to be accorded constitutional protection; defendants' rights in criminal proceedings, an area that encompasses a wide range of issues linked to the law and order theme; church-state relations, particularly questions having to do with religious instruction, Bible reading, and prayer recitation in the public schools; reapportionment of the lower house of Congress and of the state legislatures; questions relating to the definition of obscenity and pornography,

and to the constitutionality of laws designed to forbid or control the dissemination of materials classified as obscene; and issues affecting the range of permissible "conscientious" objection to war generally, and unpopular wars such as Vietnam in particular. In the current term alone, the Supreme Court will be hearing arguments on the constitutionality of a federal law extending the vote to eighteen year olds, the constitutionality of the death penalty, and cases pertaining to the legitimacy of requirements that school systems bus children in order to achieve racial integration.⁵

Almost all of these cases involve what social scientists refer to as style or symbolic issues.⁶ Since the content of the style (symbolic) issue category is in some respects residual, it will help if we begin by saying what style issues are not. As defined by those who first utilized these terms, there are two principal types of political issues, position and style issues. By position issues are meant economic issues, "pocketbook" issues, matters pertaining to individual self interest of a direct sort, such as economic loss or gain, or matters of material power.

Position issues have always had great salience in American politics. In this century, they have been especially important in the period of the Great Depression and the decades immediately following. Such position issues were the primary basis for the political coalitions that crystallized in support of and in opposition to the New Deal. Because political orientations and identifications first formed in response to position or economic issues have such strength and endurance, those Americans who came of political age in the depression era have continued to give first priority to pocketbook issues long after those issues have ceased to have prime importance for the nation.

Although social scientists know considerably less about style issues than they do about position issues, it is fairly clear that style issues have had some political importance throughout most of the nation's history. In some eras, they have been predominant, as in the 1920s when the paramount political issues were those relating to the temperance movement and the politics of prohibition; the clash between ethnic groups; the controversy over immigration policies; the conflict between the urban and rural cultures, as revealed for example in the Scopes trial and the furor over the teaching of evolution in the public schools; and the women's suffrage movement.⁷

Underlying such issues is concern over matters of style, taste, or way of life. Rather than the direct economic gratification that is at stake in the resolution of position issues, style issues entail more indirect, symbolic, and subjective gratifications. Instead of provoking conflict between economic classes, geographical sections, or interest groups competing for economic gain, style issues lead to clashes between racial,

⁵ St. Louis Post-Dispatch, Sept. 1, 1970, at 1A, col. 1-2.

⁶ The discussion that follows relies heavily upon B. BERELSON, P. LAZARSFELD, & W. MCPHEE, *VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN 184-85* (1954), a work that first utilized the concepts of style and position issues, and J. MITCHELL & W. MITCHELL, *POLITICAL ANALYSIS AND PUBLIC POLICY: AN INTRODUCTION TO POLITICAL SCIENCE 142-47* (1969), which presents a short but useful discussion of symbolic political issues generally.

⁷ H. LAZER, *THE AMERICAN POLITICAL SYSTEM IN TRANSITION 32-39* (1967).

ethnic, cultural, or religious groups, between the provinces and the cities, or simply between different personality types.

Of course, most political conflicts contain both style and position elements. Consider, for example, the Negro's drive for equality and greater rights within the American system. Among his objectives is that of improving his material position in our society, through raising his income, obtaining a better job, better education, and decent housing. But the Negro also seeks other things that are equally, perhaps more, important: acceptance of himself as a human being equal to other human beings, recognition, status, and respect, as evidenced in all the subtle ways through which one individual or group indicates to another the mutual esteem and regard in which each is held.⁸

Style or symbolic issues are often extremely volatile and may produce violence or internal war if injected into the political arena, primarily because of the intensity of belief associated with such issues and also because those most affected are not apt to abide by the normal rules of the political game in the resolution of conflict over such matters. From time immemorial, the clash of symbolic status-morality issues has therefore been accompanied by moral indignation, often by fanaticism, and frequently by near total hostility and violence. This suggests a second principal feature of style or symbolic issues: by their very nature they present extraordinarily difficult problems for political and governmental institutions.

Because symbolic issues are usually seen in absolute terms, as matters of right and wrong, those who dispute over them are seldom inclined to compromise their differences.

Those who take "wrong" views are thought to be worthy of contempt and punishment. They must be eradicated from society, severely controlled or closely watched; if they are not, they will bring society to ruin. . . . Seldom are there passionate conflicts over purely material allocative and distributive issues, for few men find it meaningful to risk their lives over a matter of subsidies, the income tax, or highway construction. But men have battled and died throughout history over religion, national honor, personal status, civil rights, moral behavior.⁹

Disputes over economic or material issues handled by the American system usually can be resolved through a politics of bargaining or compromise, either by increasing the material benefits that are to be distributed to the disputants, or by fashioning a redistribution of benefits through some scheme that is acceptable to the strongest, most influential parties to the conflict. This type of solution is rarely acceptable as a means of resolving conflicts over symbolic matters. "Splitting the difference" is simply not an effective tactic for securing agreement among those who hold strong, diametrically opposed views on the morality or rightness of a certain form of behavior.

⁸ J. MITCHELL & W. MITCHELL, *supra* note 6, at 142-43.

⁹ *Id.* at 145, 147.

A third feature of a politics that revolves around status or morality issues is that it may become almost entirely expressive in character. Rather than serving as a mechanism for identifying and implementing courses of action designed to cope with system problems, the political order may instead function almost exclusively at the symbolic-rhetorical level. This tendency is fostered by the inclination of the morally indignant to be satisfied with a politics that provides outlets for their pent-up hostilities, so long as their anxieties are also soothed by symbolic gestures emanating from those who hold positions of authority and leadership within the society.

While this brand of politics smacks of political sleight of hand, it is not completely without redeeming qualities. Certainly, it is better for some kinds of psychological needs to be met through the manipulation of political symbols than through policies or actions that actually remove sources of anxiety, especially if those sources are defined as the individuals or groups constituting the objects of moral indignation. Yet, any society that channels most of its energies into a politics of symbol manipulation can hardly expect to achieve meaningful solutions to the problems underlying either style or position issues. At the very best, system preoccupation with immediate, emotional gratification will virtually preclude reasoned consideration of alternate ways for structuring political conflict, ways that might permit the damping down of such conflict. Much more likely is a situation wherein the political leadership attempts to exploit emotional needs revolving around symbolic concerns. If that occurs, the political order may become virtually immobilized by tension, even if the conflict between opposing groups stops short of violence.

The importance of these and other psychological undercurrents in American politics has long been recognized. Yet most academicians have contended that status-moralistic concerns are of real importance only to small segments of the citizenry, principally those with radical rightist or leftist political orientations. The belated discovery of "Middle America" and growing awareness of the salience of symbolic issues to all Americans have gradually changed that outlook. Now we recognize that style issues have been assuming steadily increasing importance in American politics ever since World War II. Hindsight suggests that by the mid-fifties style issues probably had assumed the preeminence in our politics that position issues held throughout the 1930s and 1940s.

No political system is very well equipped to "solve" problems posed by symbolic or style political issues, particularly if they reflect matters of very deep concern to large segments of the population. Given the high level of its material resources and the comparatively tranquil atmosphere in which it developed as a nation, the United States might be expected to possess a relatively high capacity for coping with such problems. It would appear that the nation does not, in fact, have such a capacity.

The reasons for this incapacity are much too complex to be examined fully here.

Some of the more obvious manifestations of this incapacity can be spelled out, however.

The legislative and executive branches of our national government are each singularly unequipped to cope with very deep political cleavages growing out of conflict over symbolic issues. With the exception of the foreign policy area, these agencies of government typically respond to all political problems by means of an incrementalist policy-making process. The dominance of interest group politics means that all changes in current policy are made on the basis of minor adjustments agreed upon by the groups most affected by the policy in question. If they become potent enough politically, formerly quiescent groups that become politically active (and critical of the system) are "cut in" by being given a position in the benefit allocation structure maintained by the government. They may also be given a voice in the process through which future changes are made in the distribution formula. None of these features make the legislative and executive processes very well suited to the handling of the kind of value questions that have little if anything to do with the allocation of material (economic) resources in the society.

For most of our nation's history, the judiciary has served as the principal forum for the resolution of such symbolic and style issues. The United States Supreme Court, in particular, has virtually specialized in this area of decision-making insofar as its political function is concerned. This tendency has been especially pronounced during the past three or four decades, when the Congress and the Presidency have clearly displayed either their unwillingness or inability to deal with important symbolic political questions. Oddly, this has occurred despite the fact that the case method of decision-making employed by the courts is itself best adapted to incrementalist decision-making. Nonetheless, the Supreme Court has become the principal agency of government engaged in non-incremental policy making. The consequence has been that those having concern for consummatory as opposed to instrumental political values have increasingly turned to the judiciary to gain official support for their views.¹⁰

Given the vast increase in the number of symbolic issues that have gained national importance in recent decades, the Supreme Court has assumed an enormous political burden by agreeing to decide such matters. Despite frequent reiterations by various constitutional scholars of strictures against the Court's taking on too many political battles at once, that body has within the span of the past fifteen years taken stands, not just on one, but repeatedly on several of the political issues most stressful to the political system. On many of these issues, the Court has come down on the side of unpopular minorities. Moreover, the Supreme Court has throughout this period deviated rather consistently from the role it had played earlier in the nation's history, the role of conservative defender of the status quo. As a result, the Court for the first

¹⁰ D. APTER, *THE POLITICS OF MODERNIZATION* 422-63 (1965), examines the difficulties the American political system has in attempting to handle consummatory as opposed to instrumental value questions.

time in its history has been under almost constant attack for being more liberal than the legislative and executive branches of the national government.

Surprisingly, since the mid-1950s the Supreme Court also has become the principal agent of change within our political order. Tackling political issues that the "political" branches could not, would not, or dared not touch, the Court assumed the responsibility for political innovation, forcing changes long blocked by a Congress or by state legislatures dominated by minority elements. These were things hardly to be expected from a body habitually tradition-oriented, whose philosophy and purpose were geared to the preservation of stability and continuity, a body whose method of selection and lack of accountability are hardly designed to make it responsive to the shifting needs of the political order.

As the Supreme Court assumed a more activist role in one policy area after another, it aroused opposition from greater and greater numbers, both of the political elite and the rank and file of the population. The Court's traditional base of support within the business community, the bar, and the conservative press dwindled with each new controversial decision. Accompanying this widespread criticism from its former allies were repeated congressional efforts to curb the power of the Court, usually through proposed limitations on the Court's jurisdiction but sometimes through more far-reaching schemes that would permit reversal of Court decisions.¹¹ Although none of these efforts attracted enough support for enactment, the climate of discontent with the Court took its toll in other ways.

Hostility toward the Court and distaste for many of its decisions have led to heightened concern for the propriety of certain kinds of judicial behavior, both on the bench and off. The recent nomination of Justice Fortas to fill the vacancy in the Chief Justiceship thus became, among other things, the occasion for attacks upon him and the Court for stands he and the Court majority had taken in obscenity and defendants' rights cases. The bitter attacks upon Justice Douglas, culminating in the present efforts to impeach him, offer an even clearer example of some of the tensions underlying criticism of the Court and concern for the ethics of its members' behavior. The case against Justice Douglas is not just that his associations with and income from the Parvin Foundation may have contravened standards of judicial propriety. Nor is the animus against him solely a product of concern for his off-the-bench utterances regarding revolution and societal change. The real issue is Justice Douglas himself: what he is; the values he has stood for and still stands for; even his personal life. In short, the actual charge against Justice Douglas is that he represents just about everything that is rejected by today's political majority.

¹¹ The literature relating to court-curbing is extensive. See, e.g., W. MURPHY, *supra* note 4; C. PRITCHETT, CONGRESS VERSUS THE SUPREME COURT (1961); Grossman, *The Supreme Court and Social Change: A Preliminary Inquiry*, 13 AM. BEHAV. SCI. 535 (1970); McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229 (1965); Mendelson, *Judicial Review and Party Politics*, 12 VAND. L. REV. 447 (1959); Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965); Stumpf, *Congressional Response to Supreme Court Rulings*, 14 J. PUB. L. 377 (1965).

When a Republican President moved into the White House in 1969, it was generally assumed that he would proceed at the first opportunity to reshape the ideological posture of the Court through the appointment of conservatives to that Bench, and thus would begin the process of restoring the Court to favor with "middle" and conservative Americans. Although surely not intended for that purpose, the Haynsworth and Carswell nomination fiascoes turned out to be among the most damaging assaults ever made upon the Court's stature and integrity. Among the issues involved were again matters relating to judicial ethics, specifically issues of conflict of interest and potential bias. While the full effects can not yet be known, it may well be that in these episodes various ostensible friends of the Supreme Court, all impelled by the loftiest of motives, may have done more serious damage to the Court in a scant two years or so than could all the Court's enemies in some fifteen years of efforts to curb the Court's power. That, together with accession to the high court of Justices who are more status quo in their political orientations, may very well mark the end of an era in American judicial and political history. But the return of the Court to a less activist role will not automatically restore the integrity of the judicial process, nor resolve the many difficult problems associated with the issue of judicial ethics.

III

Although a given individual's orientations on the matter often can be traced directly to the attitudes he holds toward the Supreme Court, the current debate over judicial reform takes place in a much broader political-ideological context. Political "conservatives" and "liberals," while agreeing on some aspects of reform, disagree on many others, and tend to assign far different priorities to specific reform measures. Just as greater concern for strictness in legal ethics is linked with high professional status and thus with conservatism,¹² so is emphasis upon judicial reform via a stricter code of judicial ethics generally the product of a conservative orientation. Liberals, on the other hand, are far more inclined to urge judicial reform through measures improving access to the courts by the poor and by racial and ethnic minorities. Each point of view has much to contribute to judicial reform if not pursued to the exclusion of the other, but each philosophy also entails considerable difficulties, particularly in implementation.

The conservative point of view is largely reflected in proposals recently made by an American Bar Association committee for revision of the ABA Canons of Judicial Ethics. In addition to urging the prohibition of all political activity (except where an elective judgeship is involved), the ABA committee's guidelines would limit a judge's contacts with executive and legislative officials to consultation bearing

¹² J. CARLIN, *LAWYER'S ETHICS: A SURVEY OF THE NEW YORK CITY BAR* (1966), establishes the connection between professional status and concern with legal ethics. For the connection between professional status and liberalism-conservatism, see R. WATSON & R. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR 19-48* (1969).

upon judicial administration or to the provision of testimony on pending legislation directly affecting the judicial system. The committee also suggested the proscription of any outside activity that might affect a judge's impartiality on specific issues before his court or likely to come before it, although a judge would still be allowed to write, publish, and teach.

The bulk of the ABA committee's report dealt with means for preventing conflicts of interest of an economic nature. Besides requiring the semi-annual filing of public reports of income received from extra-judicial activities, judges would be barred from serving as officers or directors of business firms, and owning or operating businesses of their own. In what was perhaps an extreme and defensive reaction to the sorts of attacks made upon the Haynsworth nomination, the ABA committee further urged the adoption of a provision whereby a judge would disqualify himself from hearing any dispute involving a company in which he or a member of his family hold even a single share of stock. The judge would also be required to make a full public statement disclosing the stock holdings that led him to withdraw from the case.¹³ Such a rule could be enforced only with the greatest difficulty and, if enforceable, might have the most deleterious consequences for judicial recruitment. The rule conceivably could also wreak havoc with administration of justice.

Yet, the most interesting issue raised by this recommendation has to do with neither its enforceability nor its probable consequences for the bench and its efficiency, but rather with the conception of judicial impartiality that prompts the recommendation. Running throughout this and most other current proposals for improving the integrity of the judicial process there is the assumption that bias is almost exclusively economic in origin. Precedent for this point of view extends back as far as the 1924 ABA Canons of Judicial Ethics. In accepting the notion that economic self-interest constitutes the root cause of judicial bias or partiality, drafters of the Canons simply appear to have borrowed from hallowed American principles relating to the control of political corruption, making no distinctions as to whether they were faced with equivalent problems in their concern for their judiciary. Moreover, the ABA committee's recommendation designed to preclude the possible taint resulting from owning a single share of stock is, if Bayless Manning is correct, merely the latest round in a continuing, meaningless morality escalation, one through which Americans indulge their obsession with public office corruption by equating the most tenuous and potential conflict of interest with actual venality. Manning's conclusion that "we are living in an era of unparalleled honesty in public administration" surely applies with equal force to the judiciary.¹⁴ In the face of this, one can only speculate as to the reasons for the heightened attention being given to this extremely narrow and limited source of judicial bias.

¹³ St. Louis Post-Dispatch, June 24, 1970, at 18A, col. 4-7.

¹⁴ Manning, *The Purity Postlatch: Conflict of Interests and Moral Escalation*, in *POLITICAL CORRUPTION* 312 (A. Heidenheimer ed. 1970).

Underlying the attribution of bias to economic conflict of interest is also a very narrow, but typically American, conception of public ethics. Discussing American political ethics in general Abraham Kaplan remarks:

Our conception of political morality is legalistic: we usually suppose morality to be threatened only when the law is violated. For the mass of the citizenry, policy raises moral issues only when its adoption or administration involves bribery, corruption, or venality. If from the wholly legal workings of policy patent injustices result, we suppose morality to be served by acts of philanthropy or executive clemency. Morality demands mitigation of effects; correction of causes is not the domain of morals, but of hardheaded practicality.¹⁵

So, too, do we normally exclude from discussions of judicial ethics questions relating to bias originating in the ignorance of a judge, or in his lack of understanding of or sympathy for certain groups.

This can be stated more adequately in the terms utilized in our earlier discussion of position and style issues. The assertion that economic interest underlies all or most judicial bias assumes that courts are involved primarily in the adjudication of position (economic) issues. Clearly they are not. And if bias is to be precluded in the resolution of style issues, we must be concerned with much more than the warping of judgment that results from the temptation to convert public office duties into opportunities for material gain. Pertinent, too, are a judge's whole value system, his mode of perceiving and interpreting the city, nation, and world in which he lives, and his psychological predispositions. Recognition of the importance of such psychological factors in the legal process already has occurred in police department utilization of psychiatric tests to screen out applicants whose personalities do not befit them for law enforcement careers.¹⁶ There are even more compelling reasons for preventing the psychologically unfit from occupying positions in the judicial structure. Included in any realistic definition of the psychologically unfit are the many judges who are prejudiced against specific groups of litigants. Even if a judge is himself unaffected by conscious bias, there is the much larger question of whether he has the insights and knowledge that will enable him to recognize the respects in which the legal-judicial system may be denying justice to many who are prosecuted through it. "It is especially tragic," remarks Professor Jerome Skolnick, "that those who have most reason to be disenchanted with our society—particularly the poor and ethnic minorities—are treated most unjustly by the courts."¹⁷ An adequately functioning judicial system must therefore possess an impartiality that rests on more than the disinclination of its judges to line their pockets.

In its highest form of development the judiciary constitutes a decision-making structure characterized by: *impartiality*, in the sense that no decision would rest on the personal predilections of the judges; *independence*, in the sense that judges

¹⁵ A. KAPLAN, *AMERICAN ETHICS AND PUBLIC POLICY* 40 (1963).

¹⁶ St. Louis Post-Dispatch, June 28, 1970, at 4L, col. 3-4.

¹⁷ J. SKOLNICK, *supra* note 3, at 325.

would not be subservient to any specific political institutions, parties, factions, or ideologies; and *consistency*, in the sense that decisions made by the courts would not vary appreciably from one litigant or time to another unless the circumstances surrounding the cases also varied.¹⁸ "In a constitutional democracy, . . . the judiciary ideally functions as an impartial arbiter of conflict, relatively free from partisan interests—whether they be social, economic, or political."¹⁹ Such qualities are important because of their indispensability to the judiciary's ultimate functions: the legitimation of the most extreme penalties that may be exacted by government, including the taking of life itself.

Primarily because the courts have such awesome powers they attempt to buttress their appeal to rational-legal authority (Merriam's *credenda* of power) with ritual and trappings (the *miranda* of power)²⁰ designed to create the impression of "objectivity, of fairness, of thoroughness, and of *finding* the law rather than making it by arbitrary actions."²¹ Yet, such vestiges of patriarchalism scarcely have the power to suspend disbelief among those for whom the judicial process has already been demythologized. The informed, politically active part of the American citizenry has long ago ceased to accord such special status to decisions of the courts. Only the politically apathetic and the relatively uninformed are inclined to give special deference to court decisions, and they hardly ever become aware of the specific actions being taken by the courts.²²

Clearly, then, restoration of public confidence in the courts must rest on something more than efforts to resanctify the judicial process. And, so long as the courts tend to focus on style or symbolic issues, they invite the antipathy of large segments of the public, although a shift in the direction of their decisions on such issues would undoubtedly convert the political debits they now earn into modest political credits.

What can be done, then, to restore public confidence in the judiciary? The answer to that question takes us back to our earlier discussion of the role of the American judiciary vis-à-vis other governmental institutions, specifically with respect to the types of political issues that are now paramount within our system. The fact that

¹⁸ Becker, *Judicial Structure and Its Political Functioning in Society*, 29 J. POLITICS 302 (1967).

¹⁹ J. SKOLNICK, *supra* note 3, at 317.

²⁰ C. MERRIAM, *Political Power*, in A STUDY OF POWER (1950), distinguishes between the *credenda* and *miranda* of power.

²¹ W. MITCHELL, THE AMERICAN POLITY 128 (1962). See also M. EDELMAN, THE SYMBOLIC USES OF POLITICS 108 (1967).

²² Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court*, in FRONTIERS OF JUDICIAL RESEARCH 273 (J. Grossman & J. Tanenhaus eds. 1969). While inconclusive in many respects, the literature on public attitudes toward the courts affords support for the contention that attitudes toward the U.S. Supreme Court are closely related to orientations on what this paper has referred to as style or symbolic issues. See Kessel, *Public Perceptions of the Supreme Court*, 10 MIDWEST J. OF POL. SCI. 167 (1966); Murphy & Tanenhaus, *Constitutional Courts and Political Representation*, in MODERN AMERICAN DEMOCRACY 541-54 (M. Danielson ed. 1969); Murphy & Tanenhaus, *Public Opinion and the Supreme Court: The Goldwater Campaign*, 22 PUB. OP. Q. 31 (1968). Cf. Dolbeare, *The Public Views the Supreme Court*, in LAW, POLITICS AND THE FEDERAL COURTS 194-212 (H. Jacob ed. 1967); Dolbeare & Hammond, *The Political Party Basis of Attitudes Toward the Supreme Court*, 22 PUB. OP. Q. 16 (1968).

the courts are the principal forum for resolving so many important political issues is indicative of serious default on the part of our legislative and executive institutions. So long as that default continues, and the courts are responsive to pleas for the resolution of such issues, the judiciary (a most fragile institution in the halls of power politics) will continue to be buffeted by the full force of increasingly devastating political conflicts arising in the nation. But if the judiciary substantially withdraws from this particular political arena, and the popular branches of government continue their default, confidence in the courts will be bought at extremely great cost to the entire political system. Progress toward increased public support for the judiciary is, in the one instance, extremely difficult, and in the other, utterly irrelevant.

There appears to be little prospect that the legislative and executive processes can soon be transformed in such a way as to permit our political system to cope with society's deepest problems. In the near future, only a unifying external war or the resurgence of position (economic) issues of considerable potency would seem to offer the prospect of any extended respite from the turmoil of status-morality politics.

In short, while it is very doubtful that the courts can save the country, only they may be able to buy us the time necessary for revitalization of our other institutions.