THE FUTURE OF STATE COURT ADMINISTRATION

by

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INTRODUCTION

While the economic basis of the western world moved from the feudal era to the modern capitalistic era in the 16th century, and most western institutions followed in the 18th and 19th centuries, it has only been in the last thirty years that the judiciary has moved into the modern industrial world. In this brief period the judiciary was transformed from a collection of loosely interrelated courts run by individual judges to a unified centralized system: that is, an organization with clear procedures, centralized rulemaking power, centralized calendars, a unified budgetary system at the state level and a separate personnel office. **While not all state judiciaries have unified to this extent, there nevertheless has been a definite transition from fiefdom to modern bureaucracy.**

This transition has had numerous effects. Primarily, it has brought about the development of a whole new class of professionals in charge of administering the courts. It has shifted organizational power from individual judges to the judiciary administration and to the administrative head of the court system—usually the Chief Justice and his appointee, the Court Administrator.

The primary purpose of this paper is to examine the shift in judicial organizational structure from feudal to modern. In addition, this paper will examine the changing role of the state court administrator and state court administration in this new modern corporate organizational structure. We will attempt to understand why the role of the state court administrator has increased in importance; whether, indeed, the administrator has been successful in administering the courts. In addition, we will attempt to answer whether the courts and justice can be, in fact, "administered." The future of state court administration will also be examined. Finally, we will attempt to discern if the courts can survive the numerous demands placed on them; that is, if the modern corporate organizational structure constitutes an adequate structure for the courts to attain the goals of fairness, effectiveness, and efficiency. In conclusion, emerging alternatives to the corporate model will be examined.

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SHIFT IN CONCEPTUAL MODEL

Traditionally, the judiciary was symbolized by the lone judge in charge of his court, and by a general philosophical quest for fairness. Although the judge in the feudal model had a great deal of judicial and administrative power, the court itself remained rather chaotic. For example, in early England:

> ...there were no seats for counsel until about 1700. Each court was scarcely out of earshot of the others, and speakers had to compete with the noise made by the throng of suitors, attorneys and shopkeepers in the body of the Hall; until the eighteenth century there were no partitions or screens to divide the courts from the open Hall. This arrangement, seemingly impracticable to modern eyes, was a feature of English public life for five centuries.[1]

Although fairness still remains the primary concern for the courts today, the rapidly growing demands on these courts have increased the concern for efficiency. Along with other factors, such as the rise of the liberal democratic state and the maturation of capitalism, increased demands have caused an organizational shift to a corporate model characterized by standardization, hierarchy, a clear vertical division of labor, court unification and other similar bureaucratic structures and symbols. The demands on the court that have precipitated such changes have primarily been increases in caseload. The court's inability to keep up with increased filings has resulted in caseload backlog. Of course, backlog was a problem in 18th century England as well as in the US in the early 1900s, but backlog and delay have now become **the** fundamental problems of the judiciary and are referred to as the "twin demons" of the court system. Individuals must wait years to get a trial, or, in terms of the new language of the courts, "cases have to queue for years to be processed."

The adoption of a corporate model has occurred in other arenas of modern institutional life as well: witness the university and the changing role of the professor vis-à-vis the university administrator and the "systems office," or the hospital and the changing role of the doctor vis-à-vis the hospital director.

While the corporate model has lead to a more effective judiciary, its adoption has not been without costs. For the judiciary as a whole, centralization has modest costs. However, "for individual judges, who may have lost some of their former autonomy, the cost of a modest degree of administrative centralization may be perceived as relatively high."[2] Employees who before may have had personal relationships with directors and the public, must now contend with supervisors and other layers of bureaucracy in a large organization. With more cases to be processed and the growth of standardized methods to terminate them, the once intimate public

has now become faceless. Finally, the language of the corporate model does not address problems of judicial integrity, the ambivalent attitude of the public towards justice and crime, nor the problematic nature of bottom-line efficiency measures for government.

In addition to political and personal costs, the model has economic costs as well. Policy analyst Craig Kugisaki argues that "in its objectives, organization and cost consequences, a system of administered justice is thus a social welfare program in substantially the same sense as the modern refinements of social security, health insurance, and public education are social welfare programs."[3]

Thus, the judiciary, like other public agencies, must allocate scarce resources and must be accountable to its funding source. In short, justice, although not totally defined by economic considerations, is certainly confined by such considerations. Coupled with its quest for fairness, the judiciary today must be concerned with effectiveness and efficiency ("justice at what speed and at what cost?"). But how does one quantify justice? Does one allocate resources to programs that service the greatest number of cases, to judges that have the greatest productivity (judge terminations per week, cost-effectiveness), or to those that have the greatest political power, that is, those closest to top management?

These are not easy questions to answer. Bureaucracy, the modern industrial organization, through hierarchy, standardization, and synchronization (reducing idle machine time, or in the judiciary reducing idle judge time through master calendaring), has caused a productive revolution, it has changed the nature of work, the nature of administration, and the nature of organizational politics. Yet just as the corporate model has gained legitimacy, a new model that emphasizes horizontal, participatory yet conflictual modes of interaction based on quantum physics and various dialectically oriented "eastern" philosophies may emerge in the long term future.

OTHER CHANGES

The basic change, then, in court structure over the last fifty years has been from a feudal organizational model to a rational corporate model. However, there have been other fundamental changes as well: in the law, in the structure of judicial organizations, and in general attitudes towards the courts and court structure. Edward McConnell, one of the first professional court administrators and now director of the National Center for State Courts, said in a speech he gave in 1976:[4]

> I'd like to refresh your recollection as to what things were like in the courts 24 years ago at the time I was appointed Administrative Director of the Courts for the State of New Jersey.

Harry Truman was then serving his last year as President and Frederick Vinson was the Chief Justice. The landmark case of **Brown v. Board of Education of Topeka** had just been argued before the Supreme Court,...All of the significant criminal law decisions of the Warren Court,...were yet to come: **Gideon, Griffen, Escobedo, Mapp, Miranda, Gault**...few of the time considered criminal, juvenile, and appellate courts to present any particular problems, let alone administrative problems. All of the concern was on the civil side, especially with the auto negligence case. Few were the least bit concerned about affording speedy trial to those charged with crime—in fact the New Jersey Supreme Court, not then noted for being conservative, had held that one "Cockeye" O'Leary, charged with murder, was not entitled to have the indictment against him dismissed although it had been mislaid in the prosecutor's office for some 20 years!

Not only were there no public defenders, but in most states defendants did not have counsel even in felony cases, the decision in **Gideon** still being over a decade away. Legal aid offices to assist the poor in civil matters were just coming on the scene. Judicial education was almost unheard of—a lawyer took the oath of judicial office, was shown to his courtroom, given a case and that was it. Rule-making by courts was a novelty, in most states being still considered as within the sole province of the Legislature. Starting to work as a court administrator in those days was a lonely job indeed—at the time there was only one other court administrator, and he worked for the Federal Courts. It was difficult, if not impossible, to explain to lawyers and judges—let alone to your family and friends—what it was you did for a living. Everyone knew, either from sad experience or hearsay, that no one directed a judge to do anything, and that no one could possibly be managing the courts.

THE STATE COURT ADMINISTRATOR

And this was in 1952! The judiciary, how it is defined, and the role of the state court administrator, have continued to change. Today, the state court administrator does more than simply assign parking spaces to judges. The reasons for the development of his power or expanding function are many, but perhaps the most significant is simply that the problems of the courts were too great for individual judges to deal with. Robert McKay, Director of the Institute of Judicial Administration, writes that "[as] the volume and complexity of litigation mount[ed] and as courts became in-

creasingly involved in social problems with continuing supervision over remedies, judicial administration and case management became even more important."[5]

The main "problem" has been caseload increases in almost all categories: frivolous cases (it has been suggested that if the rate of suing others continues, then suing someone could well become the method by which we communicate in the year 2000); increasing rights for individuals (parents, prisoners, children, civil rights); environmental litigation; social security cases; and in general increased laws and litigation that are a result of an increasingly complex society. This is a society characterized by more technology, more people, a legal culture that benefits from increased judicial caseload, and a court system that is increasingly accessible to the public.

The court's inability to deal with this caseload has forced the courts to make fundamental changes. Of course, not all believe that the "administration" of justice is possible. William Seagle, for example, in his *Law: The Science of Inefficiency*, argues that it is only by the paradoxes and contradictions of law that power or the centralization of authority has been curbed. He believes that law is naturally ambivalent and inefficient such that any attempts effectively and efficiently to administer justice are bound to fail. Although this perspective may explain the limited success some state judiciaries have had in eliminating backlog and delay, most courts today are committed to the use of rational planning and modern management techniques in dealing with such problems.

Numerous institutions have been established as part of a national effort to introduce modern management methods in the courts, including the National Center for the State Courts, the National Institution for Justice, and the Institute for Court Management. As part of a goal to improve the administration of justice, the National Center for State Courts has been involved in projects such as forecasting appellate court trends, improving records management, and developing management information systems. Some institutes provide clearinghouse functions, and others collect national and local criminal data. All, however, are attempting to systematize the process of court administration.

STAGES OF COURT ADMINISTRATION

The key person/position around which most of the changes have occurred has been the court administrator. Along with the chief justice, the administrator has become responsible for a variety of duties, including budgeting, space management, lobbying, personnel recruitment, information systems, problem solving, planning for the future, and caseload management. More and more, the court administrator resembles the chief executive officer of a major

corporation—with the chief justice as the chairman of the board. Before we venture to speculate on the future of the state court administrator, it is useful to ask whether the court administrator has been successful in bringing the courts into the 20th century.

Here, a typology from Ernest Friesen from the California Western School of Law is helpful. While trying to determine whether court administrators have improved the efficiency of the courts, he argues that court administration has gone through three stages.[7] The first stage is that of **intrusion:** this is the phase McConnell described earlier. In this stage, administrators were not even called administrators, rather they were assistants to the chief judge, or secretary to a judicial council. The second stage is that of **experimentation.** Here, as there were no set roles for administrators, different functions were explored. Some expanded their roles, others contracted them.

The third stage, according to Friesen, is that of **survival.** He argues that this is the present crisis within the field. Instead of a clear goal, managers simply are intent on surviving—making sure that they do not intervene with the work of judges, sheriffs, and others in the justice system. They refuse to take risks and tackle only programs that inevitably will be successful. This is not only a crisis of court administration but also a crisis of the court system. The emphasis on survival—simply reacting to external and internal trends—is caused by: (1) a fear of a volatile political and technological environment—simply, future shock; (2) lack of clarity in the role of administrators towards judges; and (3) constant public criticism of the courts—"too soft on crime, too slow, and too political."

This, however, is not the only perspective. Robert C. Harrall, of the Administrative Office of the Courts of Rhode Island, argues that administrators have already survived, and have clearly shown their indispensibility to the organization. In fact, there are already more than 3,000 individuals involved in court administration in the US. Of special significance is the fact that, even though LEAA funds—which created court management positions in the 1970s—have dried up, the field continues to grow.[8]

According to Harrall, court administrators are indispensible because they render technical assistance to the courts (jury management, records management, case processing, data processing); and they serve as transfer vehicles between new ideas and the courts because they can afford to implement novel ideas.[9] They are also indispensible because of their role as spokespersons to the media and to the legislature, and their role as court evaluators. They judge whether or not the courts are achieving their strategic goals. And, as their positions have become institutionalized, survival is no longer an issue.

Thus, from Harrall's perspective, administrators and court administration have been successful. Freisen, on the other hand, ques-

tions the success of court administrators. Behind both positions is a struggle to come to terms with the role and purpose of court administration, of the non-adjudicatory dimensions of the judiciary. In attempting to understand the future of state court administrators and court administration, it is important to understand this conflict.

REDEFINING THE ROLE OF THE COURTS

As long as the courts see themselves only as dispute resolution forums then the role of the administrator is questionable and problematic. Once they expand their definition (as has been the long term trend in the courts), then the role of the administrator falls into place. One such effort to redefine or reconceptualize the courts comes from the Hawaii Judiciary Planning Manual. Here, court planner Greg Sugimoto argues that the courts have five basic dimensions:[10]

> (1) A government agency with the mission of upholding the constitution;
>
> (2) A dispute resolution forum with the task of ensuring the equitable and expeditious resolution of cases and controversies brought before the courts;
>
> (3) A public agency with the mission of promoting the effective, economical and efficient use of public resources in the administration of the Judicial system;
>
> (4) A subsystem in the legal system with the mission of promoting the administration of justice among the various subsystems of the legal/criminal justice system; and,
>
> (5) A social institution with the task of anticipating the future judicial needs of the public.

This conceptual framework expands the traditional definition of the judiciary; now, not only is it a dispute resolution forum, but it is also a public agency accountable to the Legislature as well as a proactive societal institution. The judiciary thus takes a different shape, as do the roles of the actors in the judiciary. The judiciary, of course, is also a political institution involved in policymaking and a bureaucracy involved in self survival and the enhancement of its power.[11] The administrative office is the key actor in expanding its power, prestige and budget vis-à-vis other agencies.

With this framework, Friesen's third phase of survival becomes a non-problem. The only question at hand is how far the power of the new court administrator will range: will he or she become an equal partner with the chief justice, an equal but separate partner, or will some third power relationship prevail? Frank Sherwood of the Federal Executive Center, speaking at the First National Symposium of Court Management, appropriately titled his article on the relationship between the administrator and the judge "De-

veloping the Partnership."[12] This may only be possible, however, with a chief justice who is content with appellate decision-making and willing to delegate power to a full-time administrator. If the chief justice also desires to manage the courts, then a partnership with the court administrator will be fraught with conflict.

In addition, within the context of this conceptual framework, the administrative aspects of the courts, such as the computer systems office, the planning office, the statistics office, the personnel office and budget and fiscal offices all gain legitimacy and power. No longer is all power and status held by the adjudicatory aspects of the courts. While without judges the administration could not exist, without the administration the judiciary would almost certainly collapse.

FUTURE TRENDS

Although the relationship between the adjudicatory and administrative functions of the courts will continue to fluctuate, the long term trend appears to be a decreasing emphasis on the judiciary as a Dispute Resolution Forum (at least in the strictly adversarial sense) and an increasing emphasis on the judiciary as a Public Agency and as a Social Institution.

The reasons for this are many. First of all, many of the new developments that will impact the courts will involve more than the adjudicatory aspects of the courts. For example, some new developments include the establishment of national and state level offices of mediation. They also include science courts or other special courts and forums to deal with the expected flood of litigation from the new technologies (genetic engineering, the new biology and brain drugs, robotics, computers, telecommunications, and parapsychology, for example). Designing and managing these new courts and developments certainly will involve more than the legal expertise and research that judges and law clerks can provide: the talents of administrators, policy analysts, systems analysts, and those trained in institutional design or political philosophy will also be important.

The role of planners, computer experts, and futurists could also expand as computers are increasingly used for judicial decision-making. Although initially computers will be—are—used simply to access files, they could easily be used to judge cases statistically, that is, compare one case with its predecessors, help with fact finding, voir dire, and ultimately with actual decision making. To set up this system, a necessary requirement will be a partnership between judges, computer/systems professionals and administrators.[13]

The role of the administration will also increase as administrators develop ways statistically to monitor and evaluate the "productiv-

ity" of individual judges. A totally on-line management information system would be the first step in this direction. Of course, some judges may fight administratively as well as intellectually all efforts to install any type of computer decision-making in the courts.

In addition to providing quick information to management, a computer system might also stimulate the development of horizontal structural models that transcend present hierarchical corporate models. This may be as significant a change as the development of the corporate model was in relation to the feudal model. However, telecommunications and computer technology may also lead to increased centralization of administrative power. Administrators will be able to monitor programs more closely. Through automation, judicial productivity measures will also be further developed and refined. However, at the same time, legislative auditors armed with increased data will be able to monitor the growth and efficiency of the courts.

The need for rational planning, system design, and evaluation should force administrators and judges to turn to the social sciences for assistance. Policy and social sciences would be used to help in strategic planning, program planning, emerging issues analysis, futures research as well as in decision making (in adjudication and in the administration) through statistics, through modeling and through conceptual design. While many would argue that it will be the end of the courts when the social sciences take over, it may be that judges will have more time for more human based decision-making, if court calendars can be cleaned out through modern social science methods. Instead of dealing with traffic court, judges could concentrate on more fundamental and less routine philosophical and social policy issues. Judges, of course, would have to adjust to their new role as partners, not kings, in the judiciary.

Given these trends, state court administration obviously would become a new professional field involving expertise in management, policy sciences, law, planning, and public administration. A training academy would then be the logical step in integrating and institutionalizing the education of court administrators.

Court administrators would also be more susceptible to public criticism. As the Public Agency aspect of the courts develops and becomes more evident, mistakes and perceived inefficiency will be the direct responsibility of the administrator. The administrator will be accountable not only to the chief justice, but to the public, the legislature, and to his or her employees in the judiciary. Inefficiency will not be the only problem, administrators will also have to deal with questions of integrity, an issue that so far only judges have had to face.

Perhaps the most important change in the future will be a recognition that administrators and judges are not simply system main-

tainers. Although system maintenance is a necessary function, given the complexity of problems before the courts, and given evidence that band-aid solutions simply cause side-effect problems which only exacerbate the initial problem, (for example, research has shown that simply increasing judges and support personnel does little to solve backlog), it is clear that much more than maintenance is required. What is needed is **innovation:** bold attempts to change the structure of courts, to redefine their role and purpose in society. Thus, the role of the state court administrator in the future would require not only maintenance but innovation as well. An organization of state court administrators (such as the Conference of State Court Administrators) coupled with an organization of Chief Justices (the Conference of Chief Justices) could indeed be the grounds for the social design—invention—of the new judiciary.

Redesigning the courts, redefining and if necessary expanding the definition of the courts and their boundaries, will not go uncontested. Just as there have been swings in the pendulum between judicial activism and judicial conservatism, so, too, will there be swings between system maintenance and system expansion and contraction (although, given the nature of bureaucracies, contraction is the least likely future).

BEYOND CRITICAL SIZE

Above, I have argued that rational planning methodologies and court management now are a permanent feature of the judiciary and, along with science and technology, constitute the key trends of the future. However, the use of these technologies may have numerous social costs: for one, the autonomy for judges, administrators and employees would decrease. In addition, a more subtle danger associated with adopting the modern organizational structure is that of the patho-bureaucracy, where the organization (1) grows for its own sake alone and not to fulfill any public need and, (2) becomes its opposite, what cultural historian William Irwin Thompson calls enantidromia, wherein an organization, although attempting to do good, be just or fair, instead ends up doing "evil,"[14] becoming unjust and ineffective. Here, the long-term hidden agenda of the organization is that of increasing its relative power over other agencies and branches of government under the symbolic guise of becoming more effective and efficient. As the judiciary increasingly becomes a goal-oriented, unified organization it will have to monitor its own growth carefully if it is to avoid becoming patho-bureaucratic.

Also of significance is the argument put forth by Leopold Kohr in his analysis of overdeveloped nations.[15] He argues that the present crises facing the nation state are due to its overly large size, to overdevelopment. The judiciary may also have outgrown its opti-

mal size. If this is true, then the numerous problems it faces (backlog, delay, public delegitimacy, to mention a few) may be due primarily to size. Solving these problems is not a simple task. For, no matter what management does—increase judges, add new structures, or change laws—nothing works. The only choice left, without a fundamental restructuring of the system, is to reduce the size of the judiciary, that is reduce access to the courts, decrease caseload, reduce personnel and so forth.

This coincides with Alvin Toffler's argument that if corporations are to survive in the post-industrial era they must divest themselves of certain divisions and thus reduce their size.[16] This also may be a suitable strategy for the courts. A strategy of divestment would force the courts to reexamine various functions such as family courts, foster parenting, and sheriff's offices that have been adopted in various states, and such a decrease in size may also increase public legitimacy.

However, according to Kohr, the problem of critical size limit can be transcended. He presents three ways in which this can be done: through new **technologies** (automation, computerization, management information systems), **education** (public images of the courts' projects, educating school children as to the role of the courts, through mock trials and such), and finally through **organization** (court unification, the expanding role of the administration, and structural changes).

Indeed, all the steps that Kohr recommends are steps that state judiciaries are attempting to follow (although slowly and quite conservatively). Without the use of new technologies, education, and reorganization, the courts will be unable to deal with public criticism, backlogs, attacks from legislators and prosecutors, and administrative inefficiency. Although the courts may not collapse, their weight could certainly bring them to a stall. The executive and legislative branches would then slowly take back the power, respect and status that the courts have accumulated in the last 100 years.

There is, however, a cost in going beyond critical size, according to Kohr. For once one extends beyond critical size, the final step in the adoption of the corporate model occurs: individuals in the courts no longer exist for themselves, they exist for the organization—the idea of the lone independent judge is dispelled forever; the image of the administrator with sole decision-making powers is also lost. The judiciary becomes a system, individuals become actors with specified functions within this larger system. Parts become interrelated to each other, and changes in one part of the system cause perturbations elsewhere. The whole becomes greater than the parts; the parts cannot exist except in relation to the whole; the judiciary exists unto itself. While this may lead to new levels of efficiency, judges, attorneys, and employees may not accept the

loss of autonomy and the loss of individuality that such a structural shift would entail.

THE NEXT SHIFT?

While we have argued that the judiciary has recently shifted from a feudal organizational mode to a corporate or industrial organizational mode, some organizations may be shifting to a third mode, what Buckminster Fuller calls "The Tensegrity Organization," and the organizational structure Alvin Toffler has referred to in his book *The Third Wave*.

The details of this next shift in the future of court administration are not clear. Broader analysis has been done, however.[17] According to this analysis, new technologies, physical and social, are causing and will continue to cause massive disruptions in industrial society. No longer is big better; no longer is centralization efficient; no longer is synchronization necessary; instead a more individualized or demassified "society" is forming. Just as the industrial revolution with its emphasis on efficiency and standardization brought about a new conceptual model for organizational behavior, new discoveries in physics, and new models extracted from electronics, computers, "eastern" philosophies and the like may bring about a new mode of justice and organization.

These new technologies, with their emphasis on relativity and change, would suggest a reduction of caseloads not through greater organization or through mediation, but through acceptance of greater deviance and a redefinition of numerous **criminal** acts as **non-criminal** actions.

In addition, these models stress decentralization, less hierarchy, and more flux. For the judiciary this would mean less vertical lines of command and more horizontal, participatory, organizational structures. It may also lead to an organization based on tensegrity—where each individual in the organization has equal access to any other individual and wherein power is defined as competence and not as power-over-others. The dichotomy between the administrative and adjudicatory dimensions from this new model would be non-existent. Laws increasingly would be tailor-made for the individual, there would be do-it-yourself law, and a greater role for the informal mediation sector.

Leisure in this model is as valuable as work: employees, instead of having to be at work at the same time (as in the industrial model), could use flex time or "telecommute" to work. In fact, some have suggested that decentralization might spread so far such that trials could be held through interactive video, although this might strain one's right to confront an accuser.[18]

This model might be resisted by those who fear that output-oriented work would lessen control over employees. Judges and

others might also resist direct and equal access to them by all levels of court administration.

The judiciary in this type of society would be largely concerned with creating through education a societal culture based on conflict resolution and mediation, instead of simply being a reactive institution that resolves disputes.

These new changes could transform the role of administration in the courts. Perhaps in this model the key actor would not be the attorney, the judge, the administrator, the social scientist, or the computer specialist, but the public, and the courts would primarily serve the public.

CONCLUSION

While the exact role, function and power of the administrator and administration will continue to fluctuate, expand, and contract, the administrative dimension, without a doubt, has become a central feature of the courts. The federal judiciary and state judiciaries all have adopted in varying degrees, with all its benefits and all its costs, the corporate organizational model. But just as this model has been adopted, other visions of organizational structure and of the role of law in society are emerging. How they will impact the courts is still unclear. What is certain is that the judiciary twenty years hence will be fundamentally different from the judiciary of today.

NOTES

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13. For an excellent bibliography on law and computer technology, see: *Jurimetrics* (Vol. 24, No. 3, 1984) pp. 283-290.

14. See Thompson, William Irwin, *Evil and World Order*.

15. See Kohr, Leopold, *The Overdeveloped Nations*.

16. See Toffler, Alvin, *The Adaptive Corporation*. See also Inayatullah, Sohail, "Power, Wealth, Prestige and Control" in *Futures* (Vol. 18, No. 1, 1986), p. 102.

17. See Dator, James and Clement Bezold, eds., *Judging the Future* for an excellent collection of articles on the future of the courts. Also see Inayatullah, Sohail, "Challenges Ahead for State Judiciaries," in *Futurics* (Vol. 9, No. 2, 1985), pp. 16-18.

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