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Book Review [Judging Judges]

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BOOK REVIEW

JUDGING JUDGES. By Preble Stolz. New York, N.Y.: The Free Press. 1981 Pp 427 & Appendix. Hardbound \$19.95.

*Reviewed by Peggy Hora**

Preble Stolz, in his recent book, *Judging Judges*, describes the press' interest in the investigation into the California Supreme Court's alleged misconduct preceding Chief Justice Rose Bird's confirmation election: the hearings "were given . . . probably more talent and space than the general public's interest in the court's problems warranted."¹ The same could be said about Stolz' investigatory tome.

Judging Judges tells more than anyone would ever want to know about the Commission on Judicial Performance's 1979 investigation. The Commission investigated allegations of delay and irregularity in the court's handling of politically sensitive cases and improper disclosure of confidential information prior to release of decisions.² Stolz was unable to discard any detail of investigative finding, no matter how minute, in this exhaustive inquiry into an event in the history of California jurisprudence which is unlikely to be repeated.

There is no doubt, however, that Stolz's work is important and interesting, at least to those in the legal field. The significance of the work lies in its effort to sensitize readers to the issue of the politicization of the court system. Stolz likens the current ideal of the system to an eighth grade civics class definition of courts: applying laws using principles of *stare de-*

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1. P. STOLZ, *JUDGING JUDGES* (1981), 184.

2. P. STOLZ, *supra* note 1, at 190 in which the April 20, 1979 Commission on Judicial Performance passed a resolution defining the scope of its investigation.

cisis in which the "real world" of competing political interests does not exist.

Not since the United States Supreme Court's "switch in time that saved nine"³ has the judiciary's political sensitivity been so public as the Chief Justice and her court's actions which Stolz records in *Judging Judges*. Those who wish to champion the ideal of an independent judiciary will be jolted from complacency as they are educated about the degree of outside pressure to which the justices of the Supreme Court are subject. To illustrate, the mere suggestion that Justice Matthew O. Tobriner delayed the release of the court's decision in *People v. Tanner*⁴ until after Chief Justice Bird's confirmation election is shocking to the reader. In addition, after hearing testimony for five months on the alleged delay and related issues, the Commission announced that no formal charges would be filed against any justice. One of its members, however, Tom Willoughby, stated, "It's [the Commission's report] not an exoneration just because we did not vote to bring charges."⁵ Stolz certainly leaves no room for political naivete: one cannot read the book and remain unworldly.

Despite the excruciating attention paid to every detail, the work as a whole captures the reader's attention. The court's inner workings, previously clouded by silence, are disclosed for the first time to practicing lawyers, the majority of whom will never appear before California's highest court. Readers will be captivated by the inside knowledge Stolz shares in the same way they might be titillated by gossip tabloids. It is not only irritating to read about the bickering and backbiting in which the justices engage⁶ but painful to think of the ultimate harm to the court system. Stolz points out: "If Supreme Court justices persistently talk about their colleagues as if they were unprincipled fools, the message eventu-

3. President Franklin Roosevelt's 1937 court packing plan was abandoned when Justice Roberts switched his position to become part of the 5:4 majority upholding New Deal legislation.

4. 151 Cal. Rptr. 299 (1978) *on reh'g* 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979).

5. P. STOLZ, *supra* note 1, at 395.

6. It is interesting to note that in his retirement interview in the State Bar of California's publication Matthew O. Tobriner states, "Since [Justice William] Clark left the Court, we have had very little in the way of differences." *California Lawyer* Feb. 82 at 49.

ally will trickle down the judicial hierarchy.”⁷

Although Stolz takes all the actors in this drama to task, the Chief Justice is singled out for special vitriol. It can be said that at least two justices (Clark and Mosk) behaved unprofessionally during the *Tanner* affair. Stolz never attacks them in the same way or with the same intensity with which he attacks Rose Bird. Senator H. L. Richardson, chair of the Law and Order Campaign Committee formed in June of 1978 to defeat the Chief in her confirmation election, telephoned Justice Clark the day before the election and asked if Clark would talk to reporters about the *Tanner* case and Richardson's allegations of delay.⁸ Justice Clark took three calls from the press on the day before the election, including one in which the *Los Angeles Times* election-day article, which charged delay in the release of the *Tanner* decision, was read to Clark. At the Commission hearing Clark testified that he realized he was one of the two justices referred to in the article as having confirmed the allegation of delay.⁹ Justice Stanley Mosk also spoke to the press on election eve and failed to deny that *Tanner*, which struck down the so-called “use a gun, go to prison” legislation, was being delayed.¹⁰ To compound matters Justice Clark refused to sign a statement absolving Justice Tobriner from any impropriety in handling the *Tanner* matter.¹¹ From this, Stolz concludes that no one was blameless: “Tobriner (and presumably Mosk [!]) should have said straight out that *Tanner* was not being delayed. . . . Clark should have said nothing or something, not hidden in ambiguous silence.”¹²

Though Stolz chastises Mosk and Clark for speaking to the press, he faults Bird for being unavailable to them.¹³ The Chief Justice cannot escape Stolz's displeasure, regardless of her actions.

Judging Judges begins by dissecting Bird's concurring

7. P. STOLZ, *supra* note 1, at 409.

8. Richardson admitted he had no real evidence to support his allegations but only a “subjective judgment.” P. STOLZ, *supra* note 1, at 126 citing *New West*, Nov. 19, 1979 at 127.

9. P. STOLZ, *supra* note 1, at 130.

10. P. STOLZ, *supra* note 1, at 135.

11. P. STOLZ, *supra* note 1, at 141-45.

12. P. STOLZ, *supra* note 1, at 135-36.

13. *Id.*

opinion in the *Caudillo*¹⁴ decision. He suggests that she did not read the majority opinion carefully and observes that she may lack "the intellectual power to see the opinion's flaws or she was being hypocritical."¹⁵ Stolz proceeds to accuse her of writing a concurring opinion for political purposes, "Perhaps Bird wrote a separate opinion because she thought that the *Caudillo* result—rape is not great bodily injury—was bound to become an issue in her campaign."¹⁶ He grudgingly adds that the "most creditable motivation" for writing a separate opinion was her desire to change what she saw as bad legislation. The attempt was successful since the legislature amended the penal code section before the election.¹⁷ By contrast, Bernard Jefferson, sitting on the court by assignment, escapes personal attack on his mental abilities; although Stolz finds his majority opinion lengthy and logically flawed,¹⁸ his writing style is not reduced to being labelled banal as is the Chief's.¹⁹

In the case which sustained the validity of Proposition 13,²⁰ Stolz describes the Chief's dissent as "puzzling,"²¹ finding her opinion ineffective and based on outdated law.²² Stolz adds that the decision to dissent in the case was an action that seemed "independent and courageous."²³ He concludes, however, that "she thought she was going to lose the election . . . and she might have wished, perhaps unconsciously, to leave some trace that would explain her defeat; no one wants to be a martyr without a cause."²⁴

When actually confronted with political influence on the court, rather than his conjecture into the subconscious, Stolz fails to recognize its import. In *Tanner II*,²⁵ where Clark's *Tanner I*²⁶ dissent is reworked into the majority opinion,²⁷

14. *People v. Caudillo*, 21 Cal. 3d 562, 580 P.2d 274, 146 Cal. Rptr. 859 (1978).

15. P. STOLZ, *supra* note 1, at 26.

16. P. STOLZ, *supra* note 1, at 27.

17. *Id.*

18. P. STOLZ, *supra* note 1, at 20-25.

19. P. STOLZ, *supra* note 1, at 115.

20. *Amador Valley High School v. State Board of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

21. P. STOLZ, *supra* note 1, at 31.

22. P. STOLZ, *supra* note 1, at 32.

23. P. STOLZ, *supra* note 1, at 31.

24. P. STOLZ, *supra* note 1, at 32 (emphasis added).

25. 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979).

26. 151 Cal. Rptr. 299 (1978) (reh'g granted).

Stolz is outraged by the fact that the court has essentially reversed itself in a few months time in response to public outcry. Justice Frank Newman's *Tanner II* concurrence calls the Bird recall campaign the previous fall "shrill" and "clamorous" and "inspired and nurtured by experienced, well-financed, ambitious, and posse-like 'hard on crime' advocates" ²⁸ It is apparent *Tanner II* is a political decision, but its author escapes Stolz's criticism in a way Bird does not. Moreover, instead of decrying the political manipulation of the court, Stolz tells the reader the lesson to be learned from *Tanner II*: opinions are better if written collectively. ²⁹

The Chief Justice's management style receives particular attention in *Judging Judges*. Stolz finds Bird to be "an inept politician who preferred to rely on the power of her position rather than her ability to persuade colleagues." ³⁰ The author finds the way her predecessor broke up the old boy system "acceptable" ³¹ whereas Stolz finds that the Chief "relied entirely on naked legal authority for reasons that were obscure." ³²

In *Judging Judges*, Rose Bird was damned if she did, damned if she didn't. For example, the Chief, for the first time in history, appointed trial court judges to sit *pro tem* on the Supreme Court. Stolz says:

Bird made this kind of nonsense a major target in her administration and publicized symbolic steps such as assigning for the first time a municipal court judge to sit *pro tem* on the Supreme Court. The question has to be asked whether the problem was worth so much attention. . . . ³³

Stolz misses the point; it is the symbolism itself that was important to both the trial and appellate benches. Judges, like all of us, are conscious of status. Appellate justices are more revered than trial judges, just as superior court judges have higher status than the municipal court bench. The elevation

27. P. STOLZ, *supra* note 1, at 239.

28. P. STOLZ, *supra* note 1, at 240 quoting *People v. Tanner*, 24 Cal. 3d at 546, 596 P.2d at 347, 156 Cal. Rptr. at 469 (Newman, J., concurring).

29. P. STOLZ, *supra* note 1, at 245.

30. P. STOLZ, *supra* note 1, at 104.

31. P. STOLZ, *supra* note 1, at 105.

32. *Id.*

33. P. STOLZ, *supra* note 1, at 106.

of the "lowest" judge to an appellate position breaks down the judicial class barriers which improves, rather than inhibits, communication and cooperation between the levels of the judiciary. Appellate justices who may have been directly appointed can enjoy the perspective of the trial court and vice versa. The problem was worth the attention it was given by the Chief.

To understand *Judging Judges*, one must evaluate Stolz's political consciousness. Amid the hostility Stolz describes so well, he fails to see the importance of reasons other than Bird's alleged poor administration for the difficulties with her colleagues. Stolz missed the point; as the first woman on the court, one without judicial experience and who was only forty years old when appointed, she was faced with tremendous obstacles to overcome before her leadership could become legitimate. Justice Mosk was not promoted to the chief position and "his bitter disappointment was widely known."³⁴ She faced the task of balancing a show of strength to prove her leadership with compassion to show her humanity. In this lose/lose situation, Stolz never gives her respite other than a concession that her greatest virtue is "exceptional conscientiousness and hard work."³⁵ Stolz's conclusion that "Bird's sex and [Justice Wiley] Manuel's race added nothing toward making the court's collective product stronger"³⁶ ignores the existence of racism and sexism in society. Just as it is symbolically important for trial judges to sit on the appellant bench, it is equally important for women and minorities to hold powerful, visible positions. It is also indisputable that a woman or a black in a formerly all white male institution brings a unique perspective which cannot help but enrich the collective product and process. Stolz's blind spot in this regard makes one wonder how far his view of women has evolved since his undergraduate days which he spent "pursuing skirts."³⁷

34. Lewis, *Foreward* to P. Stolz, *supra* note 1, at xvi.

35. P. Stolz, *supra* note 1, at 113.

36. P. Stolz, *supra* note 1, at 423.

37. When asked to explain his less than sterling undergraduate record compared to his excellent law school performance, Stolz said, "That may have been because I got married and was no longer pursuing skirts." Profile, *Los Angeles Daily Journal*, Dec. 29, 1981, at 1.