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bncdoc.id	F9B
bncdoc.title	The administration of justice.
bncdoc.info	The administration of justice. Sample containing about 40711 words from a book (domain: social science)
Text availability	Ownership has not been claimed
Publication date	Unknown
Text type	Written books and periodicals
David Lee's classification	W_ac_polit_law_edu

<21/c>	trial judges in the county courts and in the High Court from digressing into frolics of legal innovation, but even the trial judge will be presented from time to time with issues upon which there are no binding precedents. After all every great **House of Lords** decision, which does not involve a departure from precedent, began with the presentation of issues at first instance. So to a limited extent all judges are involved in the process of supervision and the gradual accretion of legal rules by layer upon layer of precedent. All judges face choices in the process of adjudication. Nevertheless the overwhelming majority of trials turn on the establishment of facts and the matching of those facts to well settled legal rules. Simon Lee has argued that judges' creativity ought to vary according to four factors: 1 Does the case involve statutes or common law (the latter allowing more freedom)? 2 Where is the judge in the courts' hierarchy (the higher up, the more creativity is suitable)? 3 Is the subject matter such that creativity or justice is more important? 4 What is the likelihood of other institutions of government correcting any injustice? (Lee, 1988, p. 202) Given the greater creative role of the judges in the appellate courts, it is appropriate to question whether they are fitted for the task of supervision. Today appellate judges, apart from the Lord Chancellor, are in practice recruited exclusively from among the best High Court judges, who after serving the Court of Appeal may be elevated to **the House of Lords**. This is a quite extraordinarily narrow group within the legal profession. Until the passing of the Courts and Legal Services Act 1990, only barristers could become High Court judges. Not only will the years at the Bar have moulded the barrister, but 'judicial qualities' will have been noted under the Lord Chancellor's system for recording the progress of barristers. Dossiers on barristers, known as 'yellow sheets' (actually pink cards), are kept by the Lord Chancellor's Department which record the progress of the barrister and judges will pass on comments, both favourable and unfavourable, about barristers appearing before them. By the time a barrister is considered for judicial appointment, the dossier will contain considerable information about him or her. In addition there will be discreet enquiries about the barrister's personal life. Finally there will be an interview with the Lord Chancellor. No applications are invited for High Court judgeships, though they are for Circuit judgeships (Shetreet, 1976; Lord Chancellor's Department, 1990). This system of selection for elevation to the High Court bench and for promotion to the Court of Appeal and
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	results in the character of the judiciary seeming to be self-perpetuating. The system secures a marked uniformity among the puisne judges and consequently among the appellate judges. It would also seem to discriminate against women and ethnic minorities (Cohen, 1982a). The time spent on the High Court bench will also impose its further stamp upon the potential appellate judge. The typical appellate judge will be at least 60 years of age, white, male and educated at public school and at Oxford or Cambridge and have lived in the insular world of the Bar for more than 30 years. There is clearly much scope and a very strong case for broadening the representation of the legal profession, both practising and academic, on the appellate bench. Where issues of supervision are involved, the necessity for practice at the Bar as a

	qualification for office is much harder to sustain than in relation to trials and appeals involving review. Against this background, it is hardly surprising to find assertions made that judges consistently support 'the conventional established and settled interests' and that this role of preserving stability is in conflict with the role of the judiciary as protectors of the liberties of the individual (Griffith, 1987). Professor Griffith's book The Politics of the Judiciary first published in 1977 caused a considerable stir in documenting such assertions with many examples. On judicial creativity Professor Griffith was worried that judges' emotional and personal prejudices became, perhaps unconsciously, a part of their decision-making process, and therefore lacked impartiality. The perceived need to ensure stability in society took precedence over fairness and justice. But no recipe for remedying the perceived deficiency was offered. In an article responding to the gauntlet hurled down by Professor Griffith, Lord Devlin does not deny the homogeneity of attitudes of the appellate judges, but goes on to argue that this is probably inevitable. Lord Devlin concludes: To my mind none of the evidence, general or specific adds much to the inherent probability that men and women of a certain age will be inclined by nature to favour the status quo. Is it displeasing to the public at large that the guardians of the law should share this common tendency? (Devlin, 1978, p. 509) But in the context of a consideration of judicial creativity, or perhaps lack of it, the selection of the judiciary and their 'politics' in the sense used by Professor Griffith seem to be marginal considerations. Even in the United States' Supreme Court with its overtly political processes of appointment, it seems that, in deciding landmark cases embodying sweeping reforms of the law, the justices do not always fully appreciate the significance and social consequences of their decisions (Horowitz