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The Role of Courts in American Society

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BOOK REVIEW

THE ROLE OF COURTS IN AMERICAN SOCIETY. By the Council on the Role of Courts* (J. Lieberman ed.). St. Paul, Minnesota: West Publishing Company, 1984. Pp. xiii, 171. $28.95.

Reviewed by **Richard S. Arnold**[1]

In recent years, the performance of American courts has been the subject of renewed debate. *The Role of Courts in American Society* is a welcome addition to this discourse on our system of justice. The book, though short, is broad in scope, surveying scholarship and compilations of data on a wide range of issues affecting our courts. It examines and explains the content and size of, as well as the changes in, state and federal court dockets. It also explores competing views of what courts do well and of what types of disputes are better resolved in other ways, and assesses a number of proposals for improving the courts.

The chief achievement of the book is that it is an intelligent discussion accessible not only to lawyers and scholars, but also to anyone interested in the role of the courts. The authors are consistently careful to present the legal and historical background necessary to an understanding of the topics discussed. Even those already conversant with these issues are likely to glean new information or ideas from *The Role of Courts*; it is especially valuable for integrating so much into one coherent volume.

As *The Role of Courts* notes, current unrest over litigation in America is not so much the result of the increased volume of litigation as of the fact that courts today exercise jurisdiction over a wide range of cases that some people think go far beyond the traditional role of judges. Many cases require courts to resolve disputes for which there was formerly no judicial redress. In addition, structural-reform litigation concerning

* The Council on the Role of Courts is a group of 29 distinguished lawyers, judges, and professors assembled in 1978 by Daniel J. Meador, then Assistant Attorney General of the United States in charge of the Office for Improvements in the Administration of Justice (OIAJ). The group put together this book over a series of years. Maurice Rosenberg, Professor of Law, Columbia University, and Frank E.A. Sander, Professor of Law, Harvard University, served as Chairmen of the Council, and Professor Rosenberg also chaired the Report Committee. First OIAJ (1978-81) and then the Institute of Judicial Administration (IJA) at New York University (since 1981) served as the Council's secretariat. Jethro K. Lieberman was principal editor of the Final Report.

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schools, prisons, and other public institutions has led to remedies that involve courts in administrative matters previously the sole province of the executive and legislative branches of government. The authors of *The Role of Courts* cite a number of social developments that lie behind the increased "legalization" of disputes that other institutions once would have resolved. Increased litigiousness is partially the result of the social fragmentation and declining political cohesiveness of the past few decades. Ironically, it can also be traced to the increased dependence of individuals on government and other members of society for physical and economic survival; recognizing that we are no longer (if ever we were) a nation of self-reliant yeoman farmers, we have sought through a system of legal entitlements to protect ourselves from the vargaries of life. Again ironically, increased litigation is also a product of emerging agreement on new principles and social norms, such as on civil-rights issues, and, at least among those seeking relief, agreement on the distinctive ability of courts to rectify matters. Courts and legislatures have responded to and reinforced these developments, expanding legal rights and reducing institutional barriers to litigation.[2]

To assess the burdens placed on the courts as a consequence of these changes and the way in which courts have adapted to them, the authors of *The Role of Courts* extensively examine the available data on state and federal court caseloads. Case volume has increased at all judicial levels since 1950. State courts handle vastly more cases than federal courts.[3] Yet, the data on the work state courts do are particularly sketchy. Because state courts obviously play a pivotal role in our legal system, perhaps *the* pivotal role, we must take to heart the authors' repeated recommendations that greater resources be committed to collecting and standardizing the state-court data, so that a more accurate analysis of their operations and problems will be possible.

Other points of interest *The Role of Courts*' survey of caseload data brings out include the following: State courts of limited jurisdiction, such as family and probate courts, handle more civil and more criminal cases than state courts of general jurisdiction. Less than two percent of cases filed in state courts are tried, while about six percent of federal

2. *See generally* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976).

3. The authors state that in 1976, state-court filings numbered between 70 and 108 million. THE COUNCIL ON THE ROLE OF COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY 29 (J. Lieberman ed. 1984). 1982 federal district court filings numbered less than 250,000. *Id.* at 33.

cases reach trial; apparently there has been little change in recent years in the percentage of cases filed that reach adjudication. The time that a case takes to reach adjudication depends largely upon its subject matter. Thus, state general-jurisdiction courts, which generally hear more complex and actively litigated cases than do limited-jurisdiction courts, typically suffer greater delays despite the fact that limited-jurisdiction courts generally handle a much higher number of cases. Federal district court cases tend to reach resolution more quickly than state cases. Finally, on the question of litigation costs, *The Role of Courts* cites a recent study suggesting that the popular perception that the average court case is complex and costly is not entirely accurate.[4]

The authors identify a number of significant changes and trends in litigation. Per capita use of federal courts has more than quadrupled since 1900, and state-court figures also indicate a rise in per capita usage. The number of appeals in federal courts and state intermediate appellate courts has increased sharply, outstripping the growth in case filings. The percentages of family cases, tort cases, and cases to which the government is a party, particularly civil-rights cases, have all increased, while the percentage of commercial disputes has declined. Litigants make more extensive and more frequent demands on the equitable powers of the courts. Important in this regard is the addition of institutional-reform litigation to court dockets, litigation whose significance is belied by the relatively small number of cases involved. The authors maintain that such cases have helped induce greater judicial attention to the rights of "the citizenry at large," a departure from the traditional adversarial process.

The Role of Courts notes several kinds of responses that have been made to the growing workload of the courts. Efforts to enlarge judicial resources have been impeded by a lack of money; this has been a greater problem for state courts than for federal courts because Congress has significantly increased federal-court funding in recent years. Courts have also engaged in more active management of cases by, for example, restricting discovery or encouraging settlement. Another approach has been to restructure the judicial machinery, principally through creation of specialized tribunals to handle some kinds of high-volume litigation.

Turning from an examination of what types of cases courts are han-

4. *Id.* at 60-61, *citing* Trubek, *Studying Courts in Context,* 15 L. & SOC'Y REV. 485 (1981); Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation,* 31 UCLA L. REV. 72 (1983).

dling, *The Role of Courts* takes up the more theoretical question of what types of cases the courts should handle. To illustrate conflicting positions on what functions courts effectively and legitimately perform, the authors present two views of court competence, that of the "traditionalist" and that of the "adaptationist." The authors make clear that these labels do not refer to well-defined schools of thought, but merely describe views abroad in the land to which no given individual's views or practices are likely to correspond in every particular; the authors generally restrict themselves to describing, without endorsing, these points of view.

The "traditionalist" view emphasizes the distinct role of courts in our governmental system as adjudicators. Only court functions that fall within traditional notions of the adversary process are appropriate. For the traditionalist, the role of the judge is that of a passive umpire whose duty is to ensure observance of the formal norms of the adversary process. To venture beyond these boundaries, the traditionalist maintains, undermines the legitimacy of a court's actions.

The "adaptationist," on the other hand, stresses the ability of courts to adopt varying forms and procedures and to provide flexible equitable remedies. According to adaptationists, courts may legitimately resolve any dispute presented to them if they can do so in a manner that is efficient, effective, and consistent with due process. Adaptationists assert that the traditionalists underestimate or ignore the problem of powerless parties who may lack the clout to obtain relief through the political branches and who may be unrepresented or poorly represented in the courts. They argue that judges must play an active part in overcoming this problem by, among other things, encouraging participation, closely scrutinizing *pro se* and uncontested petitions, and reaching out for information on the potential effects of decisions on absent parties. The adaptationists further argue that courts, in order to arrive at better resolutions in cases such as those involving ongoing relations or extended impact on nonparties, should borrow from other techniques, such as mediation, negotiation, and administration. Traditionalists and adaptationists have their most heated exchanges over two points: the remedial powers of the courts in extended-impact cases, and the degree to which departure from the adversarial process is permissible.

The authors identify a number of criteria relevant to determining what types of cases are appropriate for courts, such as whether resolution of the dispute requires the detached objectivity of a court, and whether, for monetary claims, the amount at stake makes the cost of judicial resolu-

tion prohibitive. Traditionalists and adaptationists differ in their application of some criteria. For example, one factor to which traditionalists accord greater weight is whether the dispute primarily involves determining past events rather than predicting or planning future events. Traditionalists feel that forecasting future behavior and designing future courses of conduct are tasks better performed by legislative or administrative bodies. Other criteria include: whether there are authoritative, ascertainable standards for a court to apply; whether the cases present only repetitive, routine factual or administrative issues that do not require the particularized consideration associated with courts; whether sounder resolution could be achieved through effectuating party preferences rather than imposing a third party's judgment; whether judicial resolution would threaten the vitality of another institution; whether the dispute arises in a specialized area and an immediate, final decision is necessary; and whether the court, if not itself the best institution to make a decision, may be helpful in determining by whom and how a decision is to be made. In articulating these criteria, the authors draw heavily on the work of Professor Lon Fuller and others discussing the characteristics of courts and adjudication.[5]

The authors attempt to apply these criteria to the universe of cases that might be submitted to a court, dividing the cases into five categories. The first category of cases, those that everyone agrees belong in court, includes constitutional claims involving life, death, or serious liberty or property interests, and disputes between sharply contesting parties asserting legal claims rooted in past events. Second are cases that, although suitable for courts, should be heard elsewhere, including cases involving small monetary claims that should be handled through less expensive procedures, and cases, such as estate administration, that do not generally require the particularized consideration characteristic of courts. Third, in the category of cases in which the court should play a "backup" role, the authors include three sorts of cases: child-custody cases (in which the court should, if possible, "guide" the parties to a negotiated settlement); other cases suitable for diversion to arbitration, mediation, or negotiation prior to court consideration; and cases in which courts, while leaving substantive decisions to another institution, prescribe the decision-making procedures that the other institution must follow. The fourth category is that of structural-reform cases, which

5. *See, e.g.*, Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

adaptationists believe belong in the courts but traditionalists generally believe do not, at least when the question of remedy is reached. Finally, there are cases generally agreed not to belong in court, such as "political questions" and questions involving matters of internal church governance.

The Role of Courts employs the distinction between traditionalists and adaptationists to highlight and explain current disputes about what role courts should play and how they should function. However, it also obscures important disputes that do not fit a traditionalist/adaptationist dichotomy. For example, the adaptationists' concern over some parties' lack of power, which prompts their criticism of strict adherence to the adversarial process on inadequate representation grounds and their demand that politically powerless parties be able to obtain institutional reform through the courts that they cannot obtain through the political branches, may come into conflict with adaptationist support for the use of alternative dispute-resolution mechanisms. Professor Owen Fiss argues compellingly against court-fostered alternative dispute resolution on grounds that illustrate this conflict between adaptationist values.[6] Professor Fiss contends that settlement prevents judges from compensating for power imbalances among parties; that when groups rather than individuals are involved, obtaining authoritative consent to the settlement is problematic; that when injunctions are part of the remedy, settlement provides an inadequate basis for continuing judicial involvement; and that, in sum, settlement promotes peace rather than justice. All too often, so-called alternative dispute-resolution mechanisms produce at best a kind of second-class, rough justice that is more rough than just. *The Role of Courts* is not entirely unmindful of these concerns,[7] but they are never brought to the fore of the discussion. Still, the book does manage to present a clear exposition of other areas of debate, and to have attempted more might have compromised its usefulness as an introduction to and overview of these matters.

Finally, *The Role of Courts* considers several proposals for strengthening the capacity of courts to handle the cases that, whatever may be

6. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

7. For example, the authors cite with seeming approval the decision by a growing number of mediators not to be a party to one-sided agreements that result from one party's ignorance or powerlessness. THE ROLE OF COURTS, *supra* note 4, at 96. They also characterize heavy-handed judicial use of mandatory settlement conferences as "an abuse of official power," *id.* at 58, to which I add a fervent "Amen."

proper theoretically, are in fact finding their way into the courts. In evaluating specialized courts, the authors note that opinions differ as to whether specialization promotes valuable expertise, or instead fosters undesirable judicial narrowness; they conclude that even if an exclusive specialized court is rejected, a specialist option, like the United States Tax Court, may nonetheless be desirable. Regarding "judicial adjuncts," such as referees and magistrates, they conclude that too little is known about their impact on adjudication, and that more study is necessary. Other suggestions the authors make are that judges should be encouraged to use pretrial conferences and other devices to curb expensive and excessive discovery and other pretrial procedures, that further attention should be devoted to the possible use of alternative dispute-resolution methods, and that the technological and administrative personnel resources of the courts should be expanded. This is by no means the most ambitious set of recommendations one could envision, but ambitious proposals should not be expected from a committee whose members represent a variety of views and which aims at presenting a more or less neutral discussion of the issues involved. More importantly, *The Role of Courts* does provide a set of proposals that can be a starting place for efforts to improve the performance of our courts.

The Role of Courts will be useful chiefly as a sort of primer of issues for nonspecialists, including nonlawyers, who must address court-related questions. A new member of a legislature, for example, would greatly profit from referring to the book for information or from studying, from time to time, specific parts of it. For that, the legal profession and the public must be in the authors' debt.