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Book Review

The Role of Courts in American Society: The Final Report of the Council on the Role of Courts

**By Jethro K. Lieberman (Principal Ed.). St. Paul, Minn.:
West Publishing Co., 1984. pp. xii, 171.**

Reviewed by James D. Hopkins†

What are courts doing? What should courts be doing? How can courts be strengthened to perform more efficiently in the future?

These questions are primarily addressed by the Council on the Role of Courts,¹ in its report issued after five years of study and a conference to which other experts in the field were invited to examine and respond to the findings. This slim but provocative volume provides answers and recommendations, both philosophical and pragmatic, to issues concerning the role of courts in our society.

In the course of its inquiry, the Council had perforce to treat matters of profound importance to any ordered community - such as what function does a court discharge, and whether other devices, either governmental or private, are better suited to discharge that function. The report, though tersely written, is far-ranging, spilling over into political, economic and sociological areas from the purely legalistic implications of the nature of courts and court systems.

Courts are intended to resolve disputes, and incidentally, as

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1. The Council consisted of a group of lawyers, scholars and judges, drawn together by Daniel J. Meador upon the suggestion of Maurice Rosenberg.

part of that process, to declare law. These are traditional and accepted functions; what emerges from this report is that American courts, as well as making law, act as a kind of gyroscope to maintain stability and confidence when the existing cultural order is in flux.² It comes as no surprise to learn what the available statistics annexed to the report show: that the great bulk of litigation arises out of the use of the automobile, and that family and tort cases have grown in volume.³ The statistics reflect the enormous changes in our society during the last sixty years, changes from settled, family-oriented communities to a restless, basically individual-oriented population. Nor does it come as a surprise to find that courts are enlarging their role as decision-makers to act as quasi-administrators in places beyond the accustomed judicial province. For various reasons, the legislative and executive branches have either ignored, or delayed in dealing with, the new problems created by the changes in society, and the courts, because they cannot refuse jurisdiction of parties, must confront the problems.

Litigation necessarily increases in an individualized setting; the absorption by the family of the ills suffered by a member of the family ceases, and the individual turns to the courts for redress of these claims. There are, of course, other factors: the spread of insurance, for example, and the development of the class action (the banding together of individuals). In addition, legislation has broadened the scope of rights and left their enforcement to the usual litigating channels. Courts are generally looked to in order to satisfy a mounting appetite for social justice on a wide front. Thus, the court system relaxes the pressure for violent governmental transformation.

The report indicates that the courts in the main have accepted their new role. Despite the flood of constantly increasing cases which pour into the court system each year, the cases have been in time disposed of, even though at a certain tension. What is a valuable aspect of the report is an enlightened and imagina-

2. THE ROLE OF THE COURTS IN AMERICAN SOCIETY: THE FINAL REPORT OF THE COUNCIL ON THE ROLE OF COURTS 21-25 (J.K. Lieberman ed. 1984).

3. *Id.* at 168. Upon comparing the number of cases filed in 1961 to the number of cases filed in 1982, the Council found that there had been a 254% increase in the number of civil cases filed within the court system, and other tort cases increased by 127% from the years 1961 to 1982. *Id.*

tive survey and appraisal of the various methods, developed and developing, for both court-assisted and independent dispositions of disputes such as arbitration, mediation, conciliation, judging, administrative processes, and even weaker forms, such as consultation and negotiation.⁴ The advantages and disadvantages of each are assayed, and tests are formulated by which a judgment can be reached as to whether one or the other of the various methods developed for alternate dispositions of disputes, or the courts, are best equipped to confront the dispute.

Thus, it is suggested that both functional and prudential criteria are serviceable to determine whether a type of case is appropriate to be heard by courts. The functional criteria include the need for objectivity, the use of authoritative standards, and the necessity to consider past as opposed to future events.⁵ The prudential criteria comprise costs, the need for individualized treatment, the preference of the parties, the relative strength of another institution, such as the family, to deal with the problem, the necessity for immediate resolution, and the ability to act indirectly.⁶ Through the use of these criteria it is concluded that courts should hear cases involving constitutional claims, criminal cases in which life or liberty is at issue, and disputes between private parties based on legal entitlement, particularly where the dispute requires findings to be made of past events.⁷ Conversely, it is said that courts should not hear cases entailing claims for money in which the cost would be greater than the damages sought, or cases where the legal issues are well-settled and the determination would be repetitive.⁸

Moreover, the Council suggests that courts should be ready to protectively assume control if litigants fail to resolve their disputes by extra-judicial measures or to move initially to divert cases to another channel, such as arbitration, and to devise alternate procedures to solve disputes.⁹ The courts should not, however, consider cases arising out of policy decisions of governmental agencies.

4. *Id.* at 94-100.

5. *Id.* at 102-08.

6. *Id.* at 108-12.

7. *Id.* at 112.

8. *Id.*

9. *Id.* at 113-14, 155.

Finally, the report rehearses the view expressed by the traditionalist school that courts should not become intimately concerned with the supervision or organization of state agencies, such as prisons or hospitals. Additionally, the report adumbrates the more liberal view of the adaptionist school that courts must take action in such instances in order to render justice on behalf of persons without effective representation in the political forum.¹⁰

Examined critically, the criteria seem general and not sharply defined in that murky area lying between constitutional claims and claims constructively frivolous by reason either of the pettiness of the damages or the established character of the governing rules. It is difficult to weigh the relative worth of cases without weighing the subjective importance of the case to the parties; sometimes the process takes as long as would hearing the case. The populist notion that every person has the right to be heard is hard to dislodge, and the common law tradition, painfully created over centuries of discord, of the substitution of peaceful decisions by courts for the blood feuds of the ancient past has been subtly converted into the expansive process wherein the courts, as a proven institution open to all, are invoked to hear disputes as trivial (and as poignant) as the class action recently brought on behalf of a seven year old child in California against the telephone company to recover the \$.50 toll charge for a call to Santa Claus.

Yet the attempt to formulate standards to screen the cases worthy of judicial resolution from those more appropriate for disposition by non-judicial conduits is commendable because it brings to the surface and treats objectively the doubts and misgivings haunting many judges concerning the function of the court system. Judges have been laboring for years to find ways to meet the ever-rising case load. The invention of internal operating devices has been exhausted; thus, it is time to consider jurisdictional controls. The Council's report serves to alert the executive and legislative branches to the deeper problems underlying the courts' dilemma and it possesses the mark of authoritativeness which should move the two other branches to act.

10. *Id.* at 117-21.

There are self-imposed limits in the report. The kinds of cases which should be heard by the federal courts as distinguished from the state courts are not broached, though the importance of the question is noted.¹¹ That, I hope, will be the subject of another study, for as Congress enacts legislation to enhance the jurisdiction of the federal courts, duplication of the functions of the state courts inevitably arises.

The report mentions, but does not emphasize, the normative function which courts perform - the judgment of fault.¹² This is an attribute which litigants in many instances seek to invoke, sometimes for personal vindication, sometimes to obtain formal condemnation of an adversary. No other forum quite takes the place of the court in meeting this need. However, whether this emphasis on fault is a cultural disadvantage remains a subject of further study - *vide* the avoidance in Japan of determining fault in favor of the conciliation of disputes.

The section of the report discussing means to strengthen the capacity of courts to give full attention and consideration to their mounting case load reaches no novel conclusions. The arguments for and against specialized courts are summarized without recommendation, apparently because conditions dictate whether specialized courts may be valuable.¹³ Similar treatment is afforded to the use of specialized judges, including the "rented judge" sanctioned in California.¹⁴ The expansion of the use of court-appointed adjuncts - referees, receivers, mediators - is suggested, but the report concludes that greater study of a permanent body of professional aides is necessary before endorsing its creation.¹⁵ Procedural innovations stressing the role of courts in managing the flow of cases at the threshold by screening to determine whether alternate methods of resolution are suitable are also described.¹⁶ It is recognized by the authors that these innovations, as well as improved physical resources, such as videotape and a library of approved social and technical material, call

11. *Id.* at 45-47.

12. *Id.* at 72-76.

13. *Id.* at 136-40.

14. *Id.* at 141-43.

15. *Id.*

16. *Id.* at 143-47.

for increased fiscal support.¹⁷ Again, the need for sympathetic executive and legislative intercession is evident.

The bibliography assembled by the report is impressive. Obviously, the literature in the field has been carefully canvassed; no suggestion for improvement in dealing with the business of the courts has escaped the collective eye of the Council.

Though the report does not, and probably cannot, give a definitive answer to all the questions it addresses, it is no small achievement to put the problems which the questions entail in clear perspective. It is of equal importance that the report acknowledges the central role of the courts as the controlling force within the group of dispute-resolving agencies. How that role is to be perceived and carried out in the future is the question that our society cannot avoid. The Council's report is an illuminating contribution towards the appreciation of the depth of the question and its ultimate solution.

17. *Id.* at 147-48.

APPENDIX

The Council on the Role of Courts

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 Richard J. Bartlett
 John Cratsley
 Alice Daniel §
 Jane Frank Harman*
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§§ Chairman, Conference Committee

* Member, Report Committee

** Chairman, 1979; Chairman, Report Committee

*** Chairman, 1980-1983

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