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Review of J. Lieberman ed., *The Role of Courts in American Society: The Final Report of the Council on the Role of Courts*

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BOOK REVIEW

THE ROLE OF COURTS IN AMERICAN SOCIETY: THE FINAL REPORT OF THE COUNCIL ON THE ROLE OF COURTS. Principal Editor, JETHRO K. LIEBERMAN. St. Paul, Minn.: West Publishing Co., 1984. Pp. 171, Appendices. \$10.00 (paper).

DOUG RENDLEMAN*

The Role of Courts in American Society (The Role of Courts) is a reform/research project that emerged from the Justice Department's Office for Improvements in the Administration of Justice (OIAJ). Dan Meador, James Monroe Professor of Law at the University of Virginia, headed the OIAJ as Assistant Attorney General from 1977 to 1979. *The Role of Courts* is a report by a group, later known as the Council on the Role of Courts, that Meador brought together under the aegis of the OIAJ to study the proper role of American civil courts. The Council became freestanding, conducted meetings and a national conference, and produced this book as its final report.

Anyone with an interest in improving the quality of civil justice should read *The Role of Courts*; summary here can serve only to entice. *The Role of Courts* stresses the need to investigate civil courts' roles, scrutinizes courts' weaknesses and strengths, describes the roles that courts play, summarizes the contemporary debate regarding whether courts should engage in structural reform or stick to simple disputes, and concludes by outlining measures to increase courts' capacities to contend with issues that come before them.

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The Role of Courts contributes important insights to the understanding of courts. Clearly written and cogent, particularly in light of its authorship by committee, the report introduces casual readers to the general subject of court reform while simultaneously clarifying the issues for specialists. Questions concerning what courts are doing, what they should be doing, and how to strengthen them, all provoke controversial answers. Few, therefore, will read the entire book without finding at least one point of disagreement. For example, *The Role of Courts* advocates vigorous case management and a specialized judiciary, although many skeptics view these reforms as chimeral and even regressive. The report, however, is balanced. It considers the arguments for both sides, and it frequently suggests a framework for analysis instead of adducing a pat answer.

The Role of Courts astutely criticizes many of the contemporary cries for "reform" based on projected caseload trends. Judicial statistics, as the book points out, are deficient, unreliable, and not comparable from jurisdiction to jurisdiction. The expense of empirical research and the law schools' tenure traditions add to the inadequacies by creating massive inertia favoring the nonstatistical status quo. As a result, organizational, jurisdictional, and procedural reforms based on current statistical assumptions are often mere shots in the dark. The report's recommendation that "substantial resources be directed toward the collection and standardization of court data in ways that would permit reliable comparative research," therefore, makes a great deal of sense.

In the present political climate, readers may not greet the book's emphasis on judicial or court-based solutions with universal approbation. Interest in alternative dispute resolution (ADR) has made discussions and conferences about ADR popular indoor sports. The founding of the *Ohio State Journal on Dispute Resolution* in Fall 1985 reflects this new-found interest. Despite the groundswell of interest in ADR, the report quite properly and laudably reminds us that courts are the primary instruments for stating, developing, and enforcing society's most noble aspirations. Courts are, and should continue to be, the crucible of government.

Many proposals to divert disputes away from judges seem to be based on a view of society that disfavors public dispute resolution. These proposals seemingly represent part of a disquieting trend

toward private solutions that is larger than the "me generation" and Reaganism. Perhaps American Public Radio's *Prairie Home Companion* has achieved its popularity in part because, as far as this faithful listener can discern, Lake Wobegone lacks lawyers. Lake Wobegone seems to have no legal problems; the few social problems that exist in this bucolic utopia are solved by a Catholic priest and a Lutheran minister. Only nostalgia, however, will lead us to conclude that such a situation can exist anywhere but in a stable and homogeneous society. Does Lake Wobegone lack asbestos, hazardous wastes, and Dalkon Shield intra-uterine devices?

Mediation, conciliation, and even arbitration are cornerstones of ADR. Too frequently, however, these methods of dispute resolution subordinate the substantive merits of decisions to preexisting power relationships. The courts, in contrast, have developed and maintained dynamic and expansive legal rights for the disadvantaged, particularly in the twenty years following 1954. The present morbidity of the doctrine that employees are employed at-will once again signals common law creativity and healthy skepticism for authoritarian relationships.

Perhaps some of the impulse for adjudicative alternatives represents a backlash against the legal rights that judges recently have developed. Are these proposals related to a narrow view of personal liberty and of the government's proper role in protecting it? Do they emerge from a premise that favors a static distribution of wealth and power? Is alternative dispute resolution a means of deregulating our society by retracting the sphere of legal regulation?

The Role of Courts reflects the political and social climate of the late 1970s and early 1980s. Its salutary prescriptions bear repeating as the issues evolve into the late 1980s. The unspoken premise in many "alternative" proposals is docket clearing. *The Role of Courts* provides a needed reminder that the best way to deal with congestion and delay is to grasp the nettle of court reform rather than to divert wholesale lots of disputes from the courts.

The inescapable truth is that our already complex society will become even more complex, and that a complex society with complex disputes needs courts to develop and articulate new principles, not merely to enforce established principles. An afternoon in a state legislative committee hearing followed by an evening at

several lobbyists' receptions will cure even the most idealistic professor of the notion that legislatures collect and sift important social data. The threats to judicial integrity today are bureaucracy and its management, the decline of collegiality, and the lack of independence. If these threats become reality, the result will be cookie-cutter justice and a lack of the reflection necessary to articulate public values. Legislatures must provide courts with the wherewithal to meet the tidal wave of work that society generates. Thoughtful studies like *The Role of Courts* help to assess the gains and losses associated with proposed innovation.

As noted above, few readers will agree with everything in *The Role of Courts*. Such disagreements are not important in assessing its worth; instead, the important question is whether the report considers the relevant factors with the appropriate emphasis. For the most part, *The Role of Courts* succeeds in this task. The report seeks to develop criteria to determine whether discrete kinds of controversies are appropriate for judicial resolution. It plays the "adaptionist" view of the judicial role against the "traditionalist" view, and applies this framework to "extended impact cases" that involve protracted judicial efforts to reconstruct social institutions, such as prisons, along constitutional lines.

The report's criteria for judicial resolution are open-ended and subjective. It suggests several relevant inquiries for determining the appropriateness of court intervention in a particular dispute, such as whether the costs of judicial intervention outweigh its benefits, whether the claims implicate constitutional issues involving "serious liberty or property interests," and whether judicial resolution would impair an institution's integrity or vitality. These suggestions prompt obvious questions of focus. Should the analysis be from the perspective of the plaintiff or the defendant? Should it be based on the political conscience of the 1960's or of the 1980's? Reactionaries like this reviewer, who are not reconciled to life in the modern age, prefer the judicial posture of the Warren Court in the 1960's.

The report's criteria also include whether the applicable standards are ascertainable and authoritative, whether the process would determine what happened in the past, and whether a ruling would design an itinerary for future conduct. The report concludes that courts are better at history than prediction. The framing of a

question often determines a court's answer. The report's focus on historical events ignores the courts' traditional role in equitable jurisdiction, the exercise of which is highly predictive. Judges grant injunctions or specific performance only after inquiring whether the remedy at law, usually damages, would be inadequate, and whether any other prudential limitations on equity are present. This inquiry historically has served well. Judges, for example, need not indulge in lengthy analyses when they consider injunctions to protect constitutional rights because no one would argue seriously that the Constitution protects interests that, if impaired, lead to money damages in a manner similar to workers' compensation statutes.

Structural reform has few defenders, but grave necessity has given birth to heroic efforts. Structural reform has been conceived in the context of school desegregation, nurtured by inhuman conditions in prisons and hospitals, and brought to whatever maturity it has achieved by courageous judges. Except as a last resort, it has few friends. Opponents of structural reform often state the issues as if they were designing a court system for Lake Wobegone, where the contested legal issues involve intersection collisions, wills, late bill payments, and minor crimes, where no one seeks to put four convicts in a cell the size of a small office, and where the only racial discrimination is against Norwegian bachelor farmers. Such a society, if one exists, does not generate "extended impact cases." Regrettably, our society sometimes does.

These quibbles aside, *The Role of Courts* deserves praise for comprehensively grappling with the intractable issues that confront the contemporary use of judicial resources. Its broad perspective and focus concerning overarching issues will educate anyone in the legal community who aspires to rise above narrow specialization. The report also deserves praise for its balance throughout, even though the fulcrum of that balance arguably may be moved one way or another, depending on one's perspective. *The Role of Courts* promises to be a solid intellectual model against which to evaluate future proposals for reform.