
Jethro K. Lieberman

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_books
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
THE COUNCIL ON THE ROLE OF COURTS

Sylvia Bacon
Richard J. Bartlett
John Cratsley
Alice Daniel $%
Jane Frank Harman *
Marvin E. Frankel
Lawrence M. Friedman
Marc S. Galanter
Joel B. Grossman *
Joseph W. Hatchett
Donald L. Horowitz
Shirley M. Hufstedler $%
Benjamin Kaplan *
Robert J. Kutak $%
Edward B. McConnell

Harold Leventhal $%
Wade H. McCree, Jr.
Carl McGowan
Robert B. McKay $%
Daniel J. Meador
Archibald R. Murray
Charles B. Renfrew
Maurice Rosenberg $%
Frank E. A. Sander $%
Antonin Scalia *
Thomas C. Schelling
William B. Spong
Paul R. Verkuil
Calvin Woodard

OBSERVERS

A. Leo Levin
Ernst John Watts

§ Resigned in 1979 upon entering federal government service
* Member, Report Committee
** Chairman, 1979; Chairman, Report Committee
*** Chairman, 1980-1983
§§ Chairman, Conference Committee
† Deceased

*
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>COUNCIL LISTING</td>
</tr>
<tr>
<td>PREFACE AND ACKNOWLEDGMENTS</td>
</tr>
</tbody>
</table>

## EXECUTIVE SUMMARY

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION: THE ROLE OF COURTS AS A PUBLIC ISSUE</td>
</tr>
<tr>
<td>II. WHAT COURTS ARE DOING AND HAVE BEEN DOING</td>
</tr>
<tr>
<td>III. WHAT COURTS DO AND DO NOT DO EFFECTIVELY</td>
</tr>
<tr>
<td>IV. STRENGTHENING THE CAPACITY OF COURTS</td>
</tr>
<tr>
<td>V. CONCLUSIONS AND RECOMMENDATIONS</td>
</tr>
</tbody>
</table>

## CHAPTER 1. INTRODUCTION: THE ROLE OF COURTS AS A PUBLIC ISSUE

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prologue</td>
</tr>
<tr>
<td>I. INTRODUCTION</td>
</tr>
<tr>
<td>A. Why This Venture</td>
</tr>
<tr>
<td>B. Scope of Study</td>
</tr>
<tr>
<td>C. Whom and What the Council Addresses; Audience and Purposes</td>
</tr>
<tr>
<td>II. &quot;FRONTIER&quot; CASES</td>
</tr>
<tr>
<td>A. School Disputes</td>
</tr>
<tr>
<td>B. Athletic Contests</td>
</tr>
<tr>
<td>C. Family Issues</td>
</tr>
<tr>
<td>D. Church Issues</td>
</tr>
<tr>
<td>E. Institutional Litigation</td>
</tr>
<tr>
<td>F. Types of Disputes Not Heard in Courts</td>
</tr>
<tr>
<td>III. AN OVERVIEW OF SOCIAL TRENDS</td>
</tr>
<tr>
<td>Notes</td>
</tr>
</tbody>
</table>

## CHAPTER 2. WHAT COURTS ARE DOING AND HAVE BEEN DOING

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. A SUMMARY VIEW OF COURTS' ACTIVITIES TODAY</td>
</tr>
<tr>
<td>A. Preliminary Note on Court Structure</td>
</tr>
<tr>
<td>B. Court Volume</td>
</tr>
<tr>
<td>Cautionary Note on &quot;Filings&quot;</td>
</tr>
<tr>
<td>1. State Court Volume</td>
</tr>
<tr>
<td>2. Federal Court Volume</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS

I. A SUMMARY VIEW OF COURTS' ACTIVITIES TODAY—Continued

C. Kinds of Work Courts Do .................................. 34
   1. In General ............................................. 34
      a. Adjudication ........................................ 34
      b. Matters in Aid of Adjudication .................... 35
      c. Non-adjudicatory Tasks ............................ 35
   2. Business of the State Courts .......................... 35
      a. Limited Jurisdiction Courts ....................... 35
         (i) Generally ....................................... 35
         (ii) Jurisdiction .................................... 36
         (iii) Procedures ................................. 36
         (iv) Caseload ...................................... 36
         (v) Dispositions ................................... 37
         (vi) Access ........................................ 37
      b. General Jurisdiction Courts ........................ 38
         (i) Generally ....................................... 38
         (ii) Subject Matter ............................... 38
         (iii) Types of Parties ............................. 38
      c. Appellate Courts .................................. 39
      a. Federal Trial Courts ............................... 39
      b. Federal Appellate Courts .......................... 39
   4. Non-adjudicative Activities of the Courts .......... 40
      a. In General ......................................... 40
      b. Legislative Acts .................................. 41
      c. Executive Activities ............................. 42
      d. Administrative or Supervisory Activities ....... 42
      e. Ceremonial Functions ............................. 44
D. The Relationship of Courts to Other Dispute-Resolvers 44

II. TRENDS AND CHANGES IN ADJUDICATING ACTIVITIES ........................................ 45

A. Importance of Discerning Trends ...................... 45
   1. In General ............................................. 45
   2. A Cautionary Note on Historical Perspective .... 45
   3. Summary of Trends .................................. 46
B. The Trends, Federal and State ....................... 48
   1. In General: Changes in the Work of the Courts  
      Since 1950 .......................................... 48
   2. Trends in State Courts ................................ 49
      a. Generally ......................................... 49
      b. Trends in Caseloads of General Jurisdiction 
         Courts ............................................ 50
      c. Trends in Trial and Outcome of Cases .......... 51
      d. Appellate Courts .................................. 51
TABLE OF CONTENTS

II. TRENDS AND CHANGES IN ADJUDICATING ACTIVITIES—Continued

3. Trends in Federal Courts ........................................ 53
   a. Generally ..................................................... 53
   b. Federal Caseload .............................................. 53
   c. Subject Matter ................................................. 53
   d. Types of Parties ............................................. 54
   e. Trials .......................................................... 54
   f. Appellate Caseload ........................................... 54
4. Summary of Trends by Types of Development .................... 55
   a. Types of Parties ............................................. 55
   b. Doctrinal Developments ...................................... 56
   c. Court Procedures ............................................ 57
      (i) Judicial Housekeeping ................................... 58
      (ii) Funding .................................................. 58
      (iii) Restructuring Judicial Machinery ....................... 59
   d. Settlement .................................................... 59
   e. Appeals ...................................................... 60
   f. Costs .......................................................... 60
   g. Delay .......................................................... 61
   h. Role of the Individual Judge ................................. 62

Notes .................................................................. 66

CHAPTER 3. WHAT COURTS DO AND DO NOT DO EFFECTIVELY

I. HISTORICAL INTRODUCTION ..................................... 72
   A. Evolution of Courts and Our Thinking About Them .......... 72
      1. Dispute Resolving ........................................... 72
      2. Law Ascertaining ............................................. 73
      3. Law Declaring ............................................... 76
   B. The American Experience ....................................... 76

II. LENSES FOR VIEWING THE COURTS ......................... 81
   A. The Traditionalist View: Courts as Dispute-Resolvers .... 83
   B. The Adaptationist View ....................................... 84

III. JUDICIAL ATTRIBUTES ......................................... 86
    A. The Nature of Judicial Cases ................................. 86
    B. Essential Characteristics of Adjudication ................... 88
       1. Operating Principles ...................................... 88
          a. Party Participation and Control ....................... 88
          b. Sharp Focus .............................................. 89
          c. Reasoned Decision ..................................... 90
          d. Finality .................................................. 90
       2. Characteristics of Adjudicating Courts .................... 90
          a. Governmental ............................................. 90
          b. Political Independence ................................ 91

IX
# TABLE OF CONTENTS

## III. JUDICIAL ATTRIBUTES—Continued

| c. Decides Submitted Disputes | 91 |
| d. Impartiality | 91 |
| e. Responsiveness | 91 |
| f. Procedural Regularity | 92 |

### 3. The Adversary Process | 92

## C. A Broader View of Adjudication | 93

## IV. COURTS IN RELATION TO OTHER DISPUTE-RESOLVING MECHANISMS AND INSTITUTIONS | 94

### A. Introduction | 94

### B. The Mechanisms Compared | 95

1. Arbitration | 95
2. Mediation | 96
3. Conciliation | 97
4. Negotiation | 97
5. Consultation | 97
6. Inquisitorial Approach | 98
7. Administration | 99
8. Legislation | 100

### C. The Mechanisms in Context | 100

## V. CRITERIA FOR DETERMINING WHICH TYPES OF CASES ARE FIT FOR COURTS | 101

### A. Introduction | 101

### B. Axes of Inclusion and Exclusion | 102

### C. Functional Criteria | 102

1. Objectivity | 102
2. Necessity for Authoritative Standards | 103
3. Determining Past vs. Future Events | 105

### D. Prudential Criteria | 108

1. Costs | 108
2. Particularized Consideration | 108
3. Preference of the Parties | 108
4. Vitality of Another Institution | 109
5. Immediate Resolution of a Specialized Problem | 111
6. Direct vs. Indirect Action | 111

## VI. APPLYING THE CRITERIA | 112

### A. Cases Suitable for Courts on Any View | 112

### B. Cases Suitable for Courts That Nevertheless Ought Not be Heard There | 112

### C. Cases in Which Courts Should Play a Backup Role | 113

1. Child Custody Cases | 113
   a. Factors Favoring Court Determination | 113
   b. Factors Opposing Court Determination | 113
   c. How the Courts May be of Use | 114
TABLE OF CONTENTS

VI. APPLYING THE CRITERIA—Continued
   2. Diversion ........................................ 114
   3. Courts as Architects of Process ............... 114

   D. Cases Not Suitable for Courts on the Traditionalist View
      That on the Adaptationist View Nevertheless Belong
      There Now ....................................... 117

   E. Cases Not Suitable for Courts .................. 120

VII. ASSESSING COURTS’ EFFECTIVENESS .......... 121
   A. On the Traditionalist View .................... 121
      1. Internal Measures ............................ 121
      2. Quality of Justice ........................... 122
      3. Quality of Process ............................ 123
      4. Summary: General Standards for Measuring Court
               Performance ............................... 124
               a. Accessibility ................................ 124
               b. Cost in Relation to Benefit ............... 124
               c. Processing Time ............................ 124
               d. Satisfaction of Parties ...................... 124
               e. Clarity of Resolution ......................... 124
               f. Demand ..................................... 124
   B. On the Adaptationists’ View .................. 124
      1. Adaptability .................................... 124
      2. Success ....................................... 125
   Notes ............................................. 127

CHAPTER 4. STRENGTHENING THE CAPACITY
           OF COURTS

I. STRUCTURAL AIDS ............................... 136
   A. Specialized Courts ............................. 136
      1. Generally ........................................ 136
      2. Probate and Bankruptcy Courts .............. 137
      3. Family and Juvenile Courts ................. 138
      4. Tax and Economic Courts ....................... 138
      5. Tentative Conclusions About Specialized Courts
               a. Complexity ................................... 139
               b. Value Conflicts ............................. 139
               c. Specialist Option .......................... 140
               d. Limited Specialization ....................... 140
   B. Specialized Judges ............................. 141
   C. Judicial Adjuncts ............................... 141

II. PROCEDURAL AIDS ............................... 143
   A. Differentiated Procedures ....................... 143
   B. Pretrial and Settlement Conference ............ 144
   C. Curbing Expensive Procedures ................... 145
TABLE OF CONTENTS

III. ENHANCED RESOURCES ........................................ 147
   Notes ......................................................... 149

CONCLUSIONS AND RECOMMENDATIONS

I. OVERVIEW ..................................................... 152
II. DETERMINING WHICH DISPUTES SHOULD GO TO COURT ........ 153
   A. Tests of Suitability ...................................... 153
   B. Contraindicators .......................................... 154
   C. Constitutionalizing Disputes ............................. 155

III. JUDICIAL BACK-UP ROLE ..................................... 155

IV. STRENGTHENING THE CAPACITY OF COURTS ................. 155

V. INADEQUACY OF DATA ......................................... 156
   Notes ......................................................... 157

APPENDICES

App.
A. TABLES
   1. Number of Cases Filed in Limited and General Jurisdiction
      Courts for 14 Sampled States (in rank order by popu-
      lation) .................................................. 159
   2. Percent of the Caseload Filed by Limited Jurisdiction
      Courts .................................................... 160
   3. Percent of All Limited Jurisdiction Cases Filed in Various
      Limited Jurisdiction Courts ............................ 161
   4. Percent of Cases Filed in Limited Jurisdiction Court by
      Type of Case ............................................. 163
   5. Percentage of Civil and Criminal Cases Filed in Limited
      and General Jurisdiction Courts ........................ 165
   6. Civil Filings in Eight State Courts of General Jurisdiction,
      1976 ....................................................... 166
   7. Cases Filed in Courts of General Jurisdiction for Five
   8. Civil Filings in Federal District Courts, 1961 and 1982 .... 168

B. PAPERS AND PROJECTS COMMISSIONED BY THE COUN-
   CIL .......................................................... 169

C. PARTICIPANTS AT THE COUNCIL'S NATIONAL CON-
   FERENCE, ST. LOUIS, MAY, 1982 ......................... 170

XII