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Review of "The Courts and Social Policy," by Donald L. Horowitz

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BOOK REVIEWS

THE COURTS AND SOCIAL POLICY

By Donald L. Horowitz*

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The appropriate limits of judicial policymaking have long vexed the American Republic. Expanding judicial activism since the 1960's has revived debate over classic issues of the role of judges in our governmental scheme. How can judicial lawmaking be reconciled with popular democracy? How can courts sponsor social change without personalizing the law and transforming judicial functions in the separation of powers?

Donald L. Horowitz' study, *The Courts and Social Policy*, is likely to become a landmark in this literature because it shifts the focus from the *legitimacy* of judicial review in democratic theory to the *capacity* of courts to make and implement social policy effectively. Ignoring the familiar question of whether judges should innovate, the author examines their ability to do so from both functional and empirical perspectives. This approach—does it work?—has the merit of eschewing the wooden intentionalism and literalism of Raoul Berger and other critics of "the imperial judiciary."[1] It also comes to grips with the changing shape of judicial activism in a period when courts compel as well as constrain social action and do so in administrative as well as legislative environments. The result is a concentrated critique of judicial policymaking in vacuums of public power.

Horowitz' central thesis is that the very processes of adjudication that equip courts to resolve particular legal disputes ill-suit them for resolving general social problems. This argument is hardly new. Illuminating is how he defends it. In the first two chapters, after accounting for the scope and sources of expanded judicial responsibilities, he inven-

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1. *See* R. BERGER, GOVERNMENT BY JUDICIARY (1977); Glazer, *Towards An Imperial Judiciary*, 41 PUB. INTEREST 104 (1975).

tories the attributes that distinguish adjudication from other forms of decision. This inventory, heavily influenced by Lon L. Fuller[2] and others[3] concerned with the "fit" between governmental process and policy problems, is itself a valuable contribution. It summarizes succinctly a process-oriented or functional view of judicial restraint, which has flourished in law school circles in the last generation. Though Horowitz does not define adjudication, he identifies five distinctive attributes, all traceable to discrete problem-solving by adversary process, which limit the capacity of courts as effective policymakers. Adjudication, he asserts, (1) focuses on rights and remedies, (2) is piecemeal, (3) lacks the initiative but must respond when litigants call, (4) is ill-adapted to ascertaining "behavioral facts" relevant to broad social problems, and (5) makes no provision for continuous policy review.[4] Most is made of the latter two conditions. Horowitz argues that courts have not faced up to the social costs or unanticipated consequences of their decisions. "The very notion of planning is alien to adjudication."[5]

The author illustrates these general themes with four case studies, one per chapter, covering a broad range of policy innovations by federal courts. In order to amplify the context of each, the author reserves to the last chapter linking the cases to the attributes of adjudication. Yet, several important questions are considered throughout, including how courts frame issues, use and misuse social science evidence, devise legal solutions, and affect target constituencies. The case histories are not simply impact studies of judicial decisions; they are detailed pathologies in judicial policymaking. Each shows judicial policies gone awry because of constraints inherent in the process of adjudication.

The worst failure was the Third Circuit's decision in the *Area-Wide Council* case,[6] where the court interpreted the "citizen participation" requirement of the Model Cities program. For Horowitz the case highlights the limited ability of courts, accustomed to reviewing action com-

2. *See, e.g.*, Fuller, *The Forms and Limits of Adjudication*, in THE PROBLEMS OF JURISPRUDENCE (temp. ed. 1949, 1961).

3. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958); K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

4. D. HOROWITZ, THE COURTS AND SOCIAL POLICY 33-56 (1977).

5. *Id.* at 51.

6. North City Area-Wide Council, Inc. v. Romney, No. 69-1909 (E.D. Pa. Nov. 12, 1969), *rev'd*, 428 F.2d 754 (3d Cir. 1970), *on remand*, 329 F. Supp. 1124 (E.D. Pa.), *rev'd*, 456 F.2d 811 (3d Cir. 1971), *cert. denied*, 406 U.S. 963 (1972), *on remand*, No. 69-1909 (E.D. Pa. Sept. 6, 1972), *aff'd*, 469 F.2d 1326 (3d Cir. 1972).

pleted elsewhere, to control action in progress. Restricted to intermittent intervention at the initiative of others, judges were unable to control the balance of competing political forces outside the courtroom. Street demonstrations rather than adjudication ultimately settled the issue of the scope of citizen participation.

In *Hobson v. Hansen*,[7] the problem was fashioning appropriate remedies for racial discrimination in the public schools in the District of Columbia. The court progressively narrowed the legal remedy from equalization of all educational resources to equalization of per pupil expenditures for teacher salaries. The premise, not validated by social science evidence, was that a positive relationship existed between teacher expenditures and student performance.[8] Narrower still was the outcome.[9] School officials managed to comply by merely transferring special-subject teachers—a maneuver requiring central controls that collided with competing policy goals of decentralized management of public schools.[10] The main lessons of this episode, to Horowitz, are the limits of adjudication in developing reliable "behavioral facts" for framing policy alternatives and the risks of unanticipated consequences as judicial objectives are implemented in unfamiliar terrain.

Similar deficiencies marred *In re Gault*[11] and *Mapp v. Ohio*,[12] two major cases of criminal procedure where judges presumably had more knowledge and control over events. In both instances, however, Horowitz contends that results fell short of intended goals and generated unexpected reactions. The chief culprit in both cases was the tendency of the Justices to apply a formal model of adversary trial to govern decisions below that were inherently informal and diverse in character. The Supreme Court overestimated the potential of formal rules to alter informal practices pervading the criminal justice system in highly diverse conditions across the country.

In particular, Horowitz criticizes the Court in *Gault* for being insufficiently skeptical of both social scientists and lawyers.[13] The initial premise that excessive informality of decisionmaking obstructs rehabilitation of juvenile delinquents was empirically suspect. The remedies

7. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc), *further relief ordered*, 327 F. Supp. 844 (D.D.C. 1971).

8. *Id.* at 436-38.

9. Smuck v. Hobson, 327 F. Supp. 844, 863-64 (D.D.C. 1971).

10. *Id.*

11. 387 U.S. 1 (1967).

12. 367 U.S. 643 (1961).

13. D. HOROWITZ, *supra* note 4, at 172-77.

of counsel and formal hearings were faulty because lawyers neither appeared with the expected frequency nor accepted the adversary ethos when they did. On the other hand, *Gault* encouraged other changes: decriminalization of substantive law, diversion of noncriminal cases from juvenile courts, and homogenization of juvenile and adult criminal procedures. Because the standards regressed toward those of plea bargaining, not adversary trial, *Gault* backfired. Even for problems close to home, Horowitz concludes that courts find it difficult to isolate causes and effects and to prevent subordinates from developing informal surrogates for onerous formal procedures imposed from above.[14]

What was true of *Gault* characterized *Mapp* "many times over."[15] Recognizing that the exclusionary rule has dual objectives—deterrence of police misconduct and preserving the integrity of adjudication—Horowitz believes that the empirical foundations for both positions are empirically shaky. Compliance with *Mapp* has been "a sometime, some-crime, someplace thing."[16] The primary effect was not to exclude evidence from trial, the presumed Supreme Court objective, but to alter the structure of incentives in pretrial bargaining about guilt and sentences. Affecting conduct in the corridors more than in courtrooms, "*Mapp* exemplifies the judicial propensity to see things whole and homogeneous, when in fact they are fragmented and heterogeneous."[17]

Though the purpose of these case studies is to develop a first set of generalizations about judicial capacity to shape social policy, Horowitz' conclusions emphasize judicial impotence. No problem turned out to be what the judges perceived, and no decision achieved the intended results. Adjudication, he concludes, is a poor format to plan, weigh alternatives, calculate costs, monitor compliance, and manage social programs. The very distinctiveness of the judicial process—"its expenditure of social resources on individual complaints, one at a time—is what unfits the courts for much of the important work of government."[18] Horowitz also emphasizes that judges as policymakers are enfeebled by an inherent bias toward formality and uniformity. Courts need to be "more cautious about dealing with diversity by means of

14. *Id.* at 217-19.
15. *Id.* at 238.
16. *Id.* at 224.
17. *Id.* at 254.
18. *Id.* at 298.

uniform rules."[19]

This summary hardly does justice to the sophistication of Horowitz' analysis regarding the relation of the judicial process to policy products. His attempts to generalize, however, expose several flaws and limits in his argument. In the first place, Horowitz is an advocate. The case histories do not represent the whole. Excluded are decisions in state courts, cases for which adjudication is presumptively well-suited, and examples of judicial pioneering that succeeded. The abortion decisions come to mind as having quick impact in reducing deaths during pregnancy.[20] The high court also recalibrated policies in a continuing stream of litigation. The reapportionment decisions are instances of high compliance but low policy impact.[21] The effort to demark the limits of judicial capacity would have been more convincing had the selection of cases been less one-sided.

Second, the author ignores effects of judicial policy innovations on the workloads of courts. It is a good question whether lower courts can deliver en masse the procedural improvements intended by the Supreme Court without greatly expanded judicial resources or resort to mass production. Either alternative will transform the traditional process of adjudication. Horowitz' case might have been stronger had he considered the administrative dimension of court-directed reform.

Third, the case studies are unsystematic. The lack of a common analytical framework limits their utility. The generalizations in the last chapter, moreover, are not woven in terms of the attributes of adjudication outlined earlier. A certain disjunction thus imbues the general and particular sections of Horowitz' own work.

Fourth, and most important, the analysis is not comparative. The question of "relative institutional capacity" concededly stalks the argument.[22] The thesis is that the attributes of adjudication are distinctive—and debilitating for courts as effective policymakers. The implication is that other institutions and processes of decision could do better, while judges should stick to their distinctive knitting. "The danger is that courts, in developing a capacity to improve on the work of

19. *Id.* at 283.

20. Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973). *See* Wall St. J., Feb. 1, 1977, at 15, col. 1.

21. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). *See* S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT 116-26 (1970).

22. D. HOROWITZ, *supra* note 4, at 294.

other institutions, may become altogether too much like them."[23]

Perhaps so, but the thesis cannot be proven without comparison or on this evidence. In fact, the case studies may prove the opposite of what Horowitz contends. The literature on decisionmaking in other organizations is replete with the same problems of defining issues and marshaling evidence, of planning and supervising subordinates, of spinning unanticipated consequences and informal surrogates for formal procedures that Horowitz attributes to the unique misfit between the process of adjudication and general social problems. Herbert A. Simon recently won a Nobel Prize for work showing that similar gaps between goals and performance are endemic to decisionmaking in organizations.[24] In an imperfect world, why should courts differ?

The basic problem is that Horowitz, presuming a rational model of adjudication without proof, does not clearly differentiate judging from other processes of governmental decision. He does not subject policymaking in legislatures and bureaucracies—even decisions in particular controversies that arguably "fit" adjudication—to the same strict scrutiny. The typology of problems suitable or unsuitable for judicial resolution is not well-developed. Blurred in consequence are the ways in which policymaking in all branches of government is uniform and in what ways adjudication is unique. The author concedes these are questions of degree. Yet, he presumes that judging involves a single process rather than multiple processes of decision in shifting policy networks. Clearer about what courts cannot do than what they can do, he underestimates a particular advantage of adjudication in policy development, *i.e.*, incrementalism, proceeding by trial and error, case-by-case, when the principles at stake are inchoate or dimly perceived.[25] Neglected, too, is a larger question of whether some policy problems are beyond *all* government solution.

No one, of course, can consider everything at once. The causal proofs required to confirm Horowitz' thesis may well exceed the capacity of social science. Besides, he attempts only initial approximations. If the book may be criticized for advocacy and lack of comparative analysis, it is nonetheless a significant contribution to the literature of judicial decisionmaking and of public policy generally. Focusing on ju-

23. *Id.* at 298.

24. H. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION (2d ed. 1961).

25. *See* Shapiro, *Stability and Change in Judicial Decisionmaking: Incrementalism or Stare Decisis?*, 2 L. TRANSITION Q. 134 (1965).

dicial capacity as an empirical question subjects to critical examination the assumptions and proofs that too often are taken for granted in normative debates over the proper boundaries of judicial power. To grapple with limits inherent in adjudication as a process places the theory of judicial decision in a larger search for manageable problems in American government. The book is succinct, well-written, and provocative. Discriminating allocation of public authority according to the "fit" between policy problems and processes of decision is its theme. It should be required reading for anyone interested in public policy and the role of courts in governing the United States.

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