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Roger C. Cramton

Cornell Law School, rcc10@cornell.edu

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JUDICIAL LAW MAKING AND ADMINISTRATION

Roger C. Cramton, *Cornell Law School*

Seventy years ago in St. Paul, Roscoe Pound gave a famous speech on "The Causes of Popular Dissatisfaction with the Administration of Justice." Recently, a prestigious group of lawyers and judges, assembled by Chief Justice Burger, reconvened in St. Paul to reconsider Pound's theme. A surprising conclusion was that, although the professionals — the lawyers and judges themselves — have many problems with the administration of justice, the tide of popular dissatisfaction is at a relatively low ebb.

In contrast to other agencies of the government, the people have confidence in the fairness and integrity of the courts. True, there is continuing complaint over the law's cost and delay. But, apart from this perennial complaint, popular dissatisfaction appears to stem from two perceptions: first, that decisions in criminal cases turn too often upon procedural technicalities rather than upon the guilt or innocence of the offender; and second, that some judges, and especially the federal judiciary, have been too actively engaged in lawmaking on social and economic issues that are better handled by other institutions of government. The layman, on scanning his newspaper or viewing the television screen, discovers to his surprise that judges are running schools and prison systems, prescribing curricula, formulating budgets, and regulating the environment.

Causation is a tricky matter. A student theme has reported that, since Smokey the Bear posters were displayed in the New York subways, forest fires have disappeared in Manhattan. Despite the risks, I hazard the generalization that several fundamental changes in the nature of our society may have altered the role of the judiciary.

Foremost among those changes is that suggested by the title of this article. The Leviathan is upon us, and it has implications for all branches of government, including the judiciary. Government now attempts so much! Every technical, economic, and social issue seems to end up in the hands of government; and the demand for further government action is combined with charges that existing government is inefficient, heavy-handed, and ineffective. This is one field in which the

appetite for nostrums does not fade with the demonstrated failure of prior cures. Each reformer, after criticizing the failure and inefficiency of government, then concludes that the remedy is — more of the same!

But our attitudes about ourselves and about conflict have also changed. The confrontational style of contemporary America assures that social conflict will increase. "Doing your own thing" is the central value of a hedonistic, self-regarding society; and patience is a nearly extinct virtue. Nowadays no one takes "no" for an answer, whether it is a job aspirant or a welfare claimant or a teacher who has been denied tenure. We perceive our society as having grown old; the enthusiastic and venturesome spirit that prompted the uncharted growth of the American past is now suffering from hardening of the arteries. As we experience slower economic development and approach zero population growth, organized groups contend with each other with increasing ferocity for larger shares of a more static pie. There is a declining sense of a common purpose; the prevailing attitude is "what's in it for me?"

These trends give lawyers and judges an even more central role in our society than they have had in the past. The decline of moral consensus and of institutions of less formal control, such as the family and the church, places much more strain on the law as an instrument of conflict resolution and social control. And the increasing contentiousness of groups organized for their own advantage has made conflict resolution a growth industry. If you could buy stock in law firms, I would advise you to do so. Lawyers have a legal monopoly on the conflict resolution industry, and it is the boom industry of today.

To these developments — the increasing reliance on law as an instrument of social control and the rapid growth of group conflict — must be added

Roger C. Cramton is dean and professor of law at the Cornell Law School. He formerly served as chairman of the Administrative Conference of the United States and as assistant attorney general in charge of the Office of Legal Counsel, United States Department of Justice.

another factor: the failure of the executive and the legislature to meet the challenge of today's inflated expectations. The public perception that these branches of government have failed — a perception greatly abetted by the debacles of Vietnam and Watergate — has led the people to turn increasingly to the courts for solutions to their problems.

Models of Judicial Review

Consider in the context of the Leviathan State two models of judicial review of administrative action. The traditional model is one of a restrained and sober second look at what government has done that adversely affects a citizen. The controversy is bipolar in character, with two parties opposing each other; the issues are narrow and well-defined; and the relief is limited and obvious. Has a welfare recipient been denied a benefit to which he is entitled by statute? Was fair procedure employed by the agency? Were constitutional rights violated?

Judicial review in this model serves as a window on the outside world, a societal escape valve which tests the self-interest and narrow vision of the specialist and the bureaucrat against the broader premises of the total society. Every bureaucracy develops its own way of looking at things and these belief patterns are enormously resistant to change. In time an agency acquires a tunnel vision in which particular values are advanced and others are ignored. An independent judiciary tests agency outcomes against the statutory framework and the broader legal context.

Judicial review in this form is an absolute essential, especially in a society in which the points of contact between officials and private individuals multiply at every point. The impartial and objective second look adds to the integrity and acceptance of the administrative process rather than undermining it. If the administrator is upheld, as usually is the case, citizen confidence in the fairness and rationality of administration is enhanced. In the relatively small number of cases in which the administrator is reversed, the administrator is forced to readjust his narrower view to the larger perspective of the total society.

During the last 20 years the pace of constitutional change, especially in judicial review of government action, has been astounding. The values implicit in general constitutional provisions such as due process, equal protection, and free speech

have been given expanded content and new life. Even more important, constitutional rights have been extended to persons who were formerly neglected by the legal system — blacks, aliens, prisoners, and others. One can disagree with the merits of particular decisions. But the general trends — implementation of fundamental values by the courts and the inclusion of previously excluded groups in the application of these values — constitute a great hour in the long struggle for human freedom.

There is, however, a second model of judicial review that is growing in acceptance and authority. This model of the judicial role has characteristics more of general problem-solving than of dispute resolution. Simon Rifkind speaks of a modern tendency to view courts as modern handymen — as jacks of all trades available to furnish the answer to whatever may trouble us. "What is life? When does death begin? How should we operate prisons and hospitals? Shall we build nuclear power plants, and if so, where? Shall the Concorde fly to our shores?"¹

Thoughtful observers believe that controversies of this character strain the capacities of our courts and may have debilitating effects on the self-reliance of administrators and legislators. At the risk of appearing more reactionary than I am, let me focus not on the achievements of the past but on the possible dangers that arise when the judiciary succumbs to pressures to attempt too much.

The Court as Administrator

The traditional judicial role, earlier described, envisions a lawsuit which is bipolar in character, seeks traditional relief (usually damages), and applies established law to a relatively narrow factual situation. The relief given is backward-looking and does not order government officials to take positive steps in the future.

The traditional model still persists in much private litigation and in many routine cases challenging official action, but in many other constitutional and statutory controversies radical changes have occurred. The changes have led Abram Chayes to argue that the basic character of public litigation has changed.² In today's public litigation, a federal judge often is dealing with issues involving numerous parties; indeed, everyone in the community may be affected. Moreover, the issues are complex, interrelated, and multi-faceted;

and they turn less on proof concerning past misconduct than on complex predictions as to how various social interests should be protected in the future. Since the remedy is not limited to compensating named plaintiffs for a past harm, the judge gets drawn, for example, into coercing school officials to close schools, bus pupils, change curricula, and build new facilities. The federal judge becomes one of the most powerful persons in the community; on the particular issue, he is the one who decides.

Consider the role of one man, Frank Johnson, in the governance of the once sovereign State of Alabama. Johnson, a distinguished United States District Judge in Alabama, is supervising the operation of the prisons, mental hospitals, highway patrol, and other institutions of the state. His decrees have directed the state to hire more wardens with better training, rebuild the prisons, and even extend to such details as the length of exercise periods and the installation of partitions in the men's rooms.

What is the authority of a federal judge to take such far-reaching actions? Why isn't the Alabama legislature the proper body to determine what prison or hospital care should be provided, and at what cost, through agencies administered by the state's executive branch? The answer is that all of these actions are designed to remedy violations of the constitutional rights of prisoners, mental patients, and others. And the Alabama legislature and executive have defaulted on their obligation to remedy these violations.

We are caught on the horns of a terrible dilemma. It is unconscionable that a federal court should refuse to entertain claims that state officials have systematically violated the constitutional rights of prisoners, mental patients, or school children. On the other hand, the design of effective relief may draw the court into a continuing role as an administrator of complex bureaucratic institutions. The dangers of the latter choice are worth brief exploration.

First, the judge who assumes an administrative role may gradually lose his neutrality, becoming a partisan who is pursuing his own cause. In one recent class action, a federal judge not only appointed expert witnesses, suggested areas of inquiry, and took over from the parties a substantial degree of the management of the case, but also went so far as to order that \$250,000 from an award required of the defendants be paid for social science research on the effectiveness of the decree.

That may be good government, but is it judicial justice?

A further problem arises from the tentativeness of our knowledge about such matters as minimum standards in operating a prison or mental hospital. We fervently hope that civilized and humane treatment will be provided to all of those who are confined to public institutions. But is it desirable to take the view of the current generation of experts, especially those self-selected by the plaintiffs or the judge, and to give their views of acceptable standards the status of constitutional requirements, with all that implies concerning their fixed meaning and difficulty of change?

Here as elsewhere, our capacity to anticipate the future or to discern all relevant facets of polycentric problems is limited. Thus, for example, when a federal judge ordered New York City to close the Tombs as a city jail or to rebuild it, the City, faced with an extraordinary financial crisis, opted to close it and prisoners confined to the Tombs were transferred to Riker's Island. The crowded conditions of the Tombs were immediately duplicated on Riker's Island. But a further result was not anticipated: Riker's Island is much less accessible to the families and attorneys of prisoners; and there is reason to believe that the vast majority of prisoners prefer the convenience of the Tombs, despite its problems, to the inaccessibility of Riker's Island.

The underlying truth is that court orders cannot by judicial decree achieve social change in the face of the concerted opposition of elected officials and public opinion. In a representative democracy, the consent of the people is required for lasting change.

The impulse to reform, moreover, is not limited to courts nor to constitutional law. A vigilant press, an informed populace, and the leadership of a committed minority have mobilized forces of change and reform throughout our history. A representative democracy may move slowly, but if we lack patience we may undermine the self-reliance and responsibility of the people and their elected officials.

The danger of confrontation between branches of government is yet another concern. What happens, for example, if Alabama refuses to fund its mental hospitals or prisons at the level required to achieve the standards specified in Judge Johnson's decrees? The next step, Judge Johnson has said, is the sale of Alabama's public lands in order to finance, through court-appointed officers, the

necessary changes.

A degree of tension is a necessary concomitant of the checks and balances of a federal system. But in our urge to check we should not forget that balance is involved as well. One of the lessons of the Watergate era is that cooperation, restraint, and patience among the various branches and levels of government is necessary if our system is to survive in the long run. As Ben Franklin said many years ago, we must hang together or we will hang separately.

Pressures for Judicial Action

Why have the courts undertaken these more expansive functions? They have not done so as volunteers desirous of expanding their own powers, but reluctantly and hesitantly in response to public demands for effective implementation of generally held values.

The American people today have little patience or restraint in dealing with social issues. An instant problem requires an instant solution that provides instant gratification. Playing this game under those rules, the executive and legislature have done their best — grinding out thousands of laws and regulations, many of them ineffective and some of them intrusive and harmful. The public, while demanding even more action from legislators and administrators, perceives these bodies as inept, ineffective, and even corrupt. Moreover, issues on which there is a deep social division, such as school busing or abortion, are avoided by elected officials, who view them as involving unacceptable political risks.

Nature abhors a vacuum and the inaction of the executive and lawmaking branches creates pressures for judicial action. A prominent federal judge put it succinctly at the recent St. Paul conference: "If there is a serious problem, and the legislature and executive don't respond, the courts have to act."

And they have done so on one after another burning issue. The mystery is that they have been so successful and that there has been so little popular outcry. The desegregation of Southern schools, of course, is a success story of heroic proportions. Legislative reapportionment is also generally viewed as a success despite the mathematical extreme to which it was carried in its later years. Organs of opinion, especially the TV networks and major newspapers, support the Court's actions in general and especially in such areas as civil rights and criminal procedure. There is no

institution in our society that has as good a press as the Supreme Court. Judicial activism, it appears, has the approval of the intellectual elite who have become disillusioned with the effectiveness of social change by other means. It is more doubtful, however, whether the common man concurs either in the elite's support of judicial lawmaking or of its substantive results.

Long-Term Effects

Neither popular acclaim nor criticism, of course, can answer the long-term question of the appropriate lawmaking role of the judiciary and the desirable limits on the scope of judicial decrees. More fundamental considerations must be decisive.

First, the practical question of comparative qualifications. Do judges, by training, selection, or experience, have an aptitude for social problem solving that other officials of government lack? And are the techniques of adjudication well designed to perform these broader policy-making functions? Professor Abram Chayes of the Harvard Law School has answered these questions with a confident affirmative.³ I am inclined to disagree.

Second, what will be the long-term effects of this trend on the credibility of the courts and on the sense of responsibility of administrators and legislators?

After completion of this article, my fears on this score received support from an unlikely source — Anthony Lewis in the *New York Times*. After acknowledging, as I do, that the Boston School Case "presented exceptional difficulties," that "a judge could [not] in conscience remit the complaining black families to their political remedy," and that District Judge Garrity's lonely efforts should be viewed with sympathy, Lewis nevertheless concludes that Garrity's involvement in the day-by-day administration of school affairs "has not worked well" and "is a serious philosophical error:"

American judges have to handle many controversial problems with political implications — redistricting, prisons and the like. Their object should always be to nudge elected officials into performing their responsibility. [Excessive intervention by the judge] tends to take responsibility away from those who ought to be seen to bear it.⁴

And finally, as Simon Rifkind has put it, there is "the ancient question, *quo warranto*? By what authority do judges turn courts into mini-legis-

latures?"⁵

The critical question in a republic is how government by nonelected, lifetime officials can be squared with representative democracy. The magic of the robe, the remnants of the myth that law on these matters is discovered by an elaboration of existing rules (rather than by personal preference), and the prudence of the judiciary in picking issues on which it could command a great deal of popular support — perhaps these factors explain why the judges have been as successful as they have.

I fear, however, that the judiciary has exhausted the areas where broad majoritarian support will sustain new initiatives and that the tolerance of local communities for "government by decree" is fast dissipating. If so, caution is in order lest a depreciation of the esteem in which we hold the courts undermines their performance of the essential tasks that are indisputably theirs and that other institutions cannot perform.

The authority of the courts depends in large part on the public perception that judges are different from other policy makers. Judges (but not elected officials) are impartial rather than willful or partisan; judges utilize special decisional procedures; and they draw on established general principles in deciding individual cases. In short, traditional ideas concerning the nature, form, and functions of adjudication as a decisional technique

underlie popular acceptance of judicial outcomes.

While the precise boundaries of the adjudicative technique are flexible rather than fixed, if they are abandoned entirely the judge loses credibility as a judge. He becomes merely another policy maker who, in managing prisons or schools or whatnot, is expressing his personal views and throwing his weight around. When that point is reached, the judge's credibility and authority is no greater than that of Mayor White in Boston or Mayor Rizzo in Philadelphia.

With the credibility of the legislature and executive branches of government in such disrepair, we cannot afford any further depreciation in the judicial currency. General acceptance of the authority of law is a necessary bulwark of our otherwise fragile social order. If it disappears, the resulting collapse of order may put the American people in the mood for that "more effective management" which is likely to characterize any distinctly American brand of authoritarianism.

Opportunities for charismatic and authoritarian leadership, it has been said, derive in considerable measure from the ability to "accentuate [a society's] sense of being in a desperate predicament." If the courts, by overextension and consequent failure, contribute to our growing sense of desperation, our liberties may not long survive. When a people despair of their institutions, force arrives under the masquerade of ideology.

Notes

1 Simon H. Rifkind, "Are We Asking Too Much of Our Courts?" paper prepared for the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St. Paul, Minn., April 8, 1976, p. 5.

2. Abram Chayes, "The Role of the Judiciary in a Public Law System," *Harvard Law Review* (May 1976).

3. *Op. cit.* n. 2, *supra*.

4. *New York Times*, May 24, 1976, p. 29.

5. Rifkind, *op. cit.* n. 1, *supra*, p. 20.