



Fall 9-1-1954

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Recommended Citation

Harold R. Medina, *Procedural Reform and the Achievement of Justice*, 11 Wash. & Lee L. Rev. 141 (1954).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol11/iss2/2>

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Washington and Lee Law Review

Member of the Southern Law Review Conference

Volume XI

1954

Number 2

PROCEDURAL REFORM AND THE ACHIEVEMENT OF JUSTICE*

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At one time or another probably every single member of the community has meditated upon the subject of the difference between law and justice. Hidden behind the quips and jokes about lawyers and judges and the administration of justice generally there is a deep-seated feeling, ranging anywhere from mere suspicion to deep conviction, that somehow or other the vast mills of the law grind out judgments and statutes and practices and procedures which essentially fail to achieve justice. I venture to say that there are few sufferings more poignant than those of the man who knows in his soul that he is in the right but who comes out of an altercation with society or with his neighbors or from a lawsuit with a decision against him.

It is bad enough when one of us feels that he has been unjustly dealt with by his friends or his business associates or his adversaries in the ebb and flow of life. But the experience is devastating when the injustice, whether real or fancied, has been or seems to have been perpetrated by the very system supposedly designed by organized society for our protection.

Some of this is due, of course, to the fallibility of the human animal. It is possible for a person to think he is right when in fact he is wrong; it is possible for juries and for judges to make mistakes. And no amount of tinkering with the rules of the game and the formulation of the laws and improving the procedures for the administration of justice will ever wholly eliminate the possibility of error.

What I wish to emphasize here at the outset is the downright suf-

*From the sixth annual John Randolph Tucker Lectures, delivered by Judge Medina before the School of Law of Washington and Lee University on April 23 and 24, 1954. The complete Lectures will be published in book form at a later date.

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fering of the person unjustly dealt with by society. Here, I believe, is the origin and the source of all the speculation on the subject of law and justice. And I am talking about what goes on in the mind of the ordinary person, whether he be a businessman or a mechanic or a college professor or a manicurist.

The curious part of all this is that the very people who thus speculate on the subject and who are convinced that the law is one thing and justice something different, fail to realize that the people of every race and every geographical section of the world have devised their particular system of laws, and all the complicated procedures which go hand and hand with the administration of justice everywhere for the special purpose of achieving justice. We must put that down for a fact.

There is no such thing as achieving justice by the process of merely trying to be fair in particular situations.

I remember when I was a boy in school reading Caesar's Commentaries. When the troops went into their winter quarters, Caesar went back to one of the larger communities in Gaul and held the assizes. I used to wonder what he did there and what the assizes were. Well, it is all very simple. He held court and this meant that he sat on a sort of an elevated throne and the people came before him and he heard each side and then handed down his decision out of hand. Doubtless he tried to do the right thing; but it does not require much imagination to realize that he must often have been influenced by the exigencies of his military plans and position and his executive power as the Roman deputy. And it is a curious fact that in world history we so often find the executive and the judicial power residing in the same persons, despite the manifest inconsistency.

And so if we place ourselves in the position of those who tried to struggle with this problem in primitive societies we can see how laws and systems of laws gradually emerged. And one does not have to be very learned or very profound to realize that inevitably the judges and lawyers or priests, or whoever they were, spent a good deal of their time formulating rules of procedure. To avoid confusion and chaos there had to be ways of doing things in administering laws. To the insiders who were the only ones who understood such matters these masses of procedural technicalities have always been a happy hunting ground. Of course the initiates never denied that the merits of the case and the application of the governing rule of substantive law were matters of first importance. But the merits had a way of getting lost in the fog. There were rules about how to get the case before a judge, rules about the formulation of the claim and the de-

fense, rules about who should go first and who should go last, rules about the deliberations of jurors and so on. Just imagine having a rule that the jury must go without food or light or heat and goodness knows what else while deliberating upon their verdict.

The undoubted fact is that lawyers and judges like to play with these things and, when they have once mastered the intricacies of any particular system of procedure, it is only human nature for them to perpetuate their monopoly, if they can.

In the old days, and the time of which I speak is within my own lifetime, all the law students in all the law schools had to study Common Law Pleading. What a system for the doing of injustice! And yet Coke and Littleton and all the lawyers and judges of their time revelled in these niceties and thought the system must have been of divine origin. But the people who were thrown out of court on one technicality after another must have suffered the tortures of the damned.

No system of laws designed by man has ever been perfect. The quest for justice is like the search for truth; it goes on and on endlessly. There is always work to be done in the vineyard. And I verily believe that of all the instances where justice has fallen short of its mark, perhaps a majority have been due to defects and shortcomings in matters of procedure.

The subject of this lecture is the discussion of some of the more important of these procedural inadequacies, especially those which are hardly ever given formal treatment in the traditional curriculum of the typical American law school. These are indeed earthy subjects, as you shall see. They are tough, thorny, and difficult of solution. Their importance will be self-evident. That is why I am preaching the gospel about them.

First in importance is the selection of judges and the making of provisions for their tenure, compensation and retirement. A corollary subject is the selection of jurors, providing them with suitable quarters and accommodations, and the formulation of methods designed to obtain general jury panels which represent a true cross section of the community. Next, the business management of the courts, by court integration, Judicial Councils and by the establishment of an administrative officer or director or executive assistant to the Chief Justice. Fourth, judicial regulation of procedure by giving the rule-making power to the highest court of a state and taking it away from the legislature.

Incidental questions, to which we shall not have time to give more

than passing reference, but which are part of the general pattern, relate to the preliminary training and the licensing of attorneys and counsellors at law, bar integration, the general simplification of procedure and the development of new devices such as pretrial conferences and summary judgments.

Selection of Judges

It is universally recognized that our particular brand of democracy cannot function without judges and courts to interpret our Constitutions and our laws and to maintain the equality of all before the bar of justice. And it should follow, as night the day, that we should select as judges of the entire judicial hierarchy, from the lowest to the highest, only those who have the best qualifications to be judges, and that the selection should be made on the basis of merit alone. But the fact is otherwise. And bear in mind that I recognize that we have large numbers of judges of the highest type. I am not attacking the judges; but I do say the existing system leaves much to be desired.

The background is interesting. The Founders realized the importance of an independent judiciary. One of the complaints against George III, in the Declaration of Independence, was that

“He has made the judges dependent upon his will alone for the tenure of their offices and the amount and payment of their salaries.”

And so it was that the constitutional provisions of 10 of the original 13 states and of 8 of the 11 new ones admitted before 1830, gave life tenure or tenure “during good behavior” to their judges.

But the effect of the Jacksonian Revolution, from 1830 to 1850, was disastrous. Here is a comment by James Bryce, writing in 1889:

“Any one of the phenomena I have described—popular elections, short terms, and small salaries—would be sufficient to lower the character of the judiciary. Popular elections throw the choice into the hands of political parties, that is to say, of knots of wire-pullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance. Short terms oblige the judge to remember and keep on good terms with those who made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence.”

It would be a weary and unprofitable task to recount the seemingly endless steps taken here and there to reduce the common law powers of the judges; and this must inevitably have resulted in some diminution in their general stature and dignity. The adoption in New York

of the Code of Civil Procedure, harnessing the judges with over 3000 Sections containing the most detailed provisions governing every step and reducing flexibility to a minimum, was part of the process; and this set off a chain of reaction of Codes in a large number of other states, especially the new ones.

Whatever may have been the course of development of this historical sequence, the undoubted fact today is that there is now a tie-up between the judiciary and partisan politics which I believe to be fundamentally wrong. I am not particularly interested in whether the judges are appointed by the state executive or elected by the people. In New York, where the governor appoints to pre-election vacancies, the result over the years has been about the same. With some exceptions he generally takes the man selected by the local political leaders. What I am interested in is getting the judges out of partisan politics, lock, stock and barrel.

Of course the politicians are against this. I don't blame them; nor do I accuse them of any wrongdoing. All jobs are grist for the political mill and judgeships are the juiciest of the lot. Moreover, the whole political apparatus, including most of the judges themselves, especially those in the lower civil and criminal courts, are in favor of maintaining the status quo. But plain Mr. and Mrs. John Doe and all the other ordinary citizens who have no axes to grind, and who instinctively look upon their judges with affection and even with reverence, are and always will be opposed to any avoidable connection between the judiciary and partisan politics.

The reasons are not far to seek. Everyone knows that in vast areas of the country, and especially so in New York, the political leaders and not the electorate select the judges. Whether or not there is justification for it—and I readily admit that almost always there is none—the average man thinks some of the judges are subject to influence. It is not enough that the judges in fact be men of integrity; it is of equal importance that they be thought to be so. Chief Justice Vanderbilt often refers to a Gallup Poll which indicated that 28 per cent of those answering the inquiry stated that they did not believe that their local criminal judges were honest. As a matter of fact the fixing of traffic tickets has approached the point of being a national scandal.

Think of the benefits which must accrue to the judges themselves were such a separation of the judiciary from partisan politics to become an accomplished fact. The increase in independence and dignity are too plain for argument. Leaders of the bar, many of whom come from humble beginnings, would more readily accept judicial positions when freed from any sense of obligation. The removal of the burden of par-

ticipation in party politics would leave to the judges more time for the uninterrupted performance of the judicial duties for which they were chosen and for which they are paid their salaries.

As a matter of fact, plans for removing the judges as far as possible from partisan politics are under consideration in a large number of states at this very time. There is a California system already in operation. The Missouri plan is probably the most successful. Other proposals are being studied in Indiana, Kentucky, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, West Virginia and Wisconsin; and there is discussion of the subject by bar groups in nearly every state of the Union.

It is interesting to know that all this stemmed from a resolution by the House of Delegates of the American Bar Association in 1937, recommending that vacancies be filled preliminarily by appointment by the state executive "from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other office." The appointees, under this plan, after a relatively brief period in which the voters have an opportunity to evaluate their abilities on the basis of actual performance, are submitted to the approval of the electorate without the endorsement of any political party. It is typical of most of the plans now under discussion that the judges be elected without party labels, that they be not permitted to hold office in any political party during their judicial tenure, and that they be forbidden to contribute money or services, directly or indirectly, to any political party or organization, or to take part in any political campaign.

This sounds like the millenium, doesn't it? Well, it may well come to pass if enough of you young people get bitten by the bug I was talking about in the first lecture.

I could go on about paying the judges decent salaries, increasing their tenure of office where the terms of office are now too short, and making suitable provisions for retirement. I have seen instances of judges in their late seventies and eighties who hold on only because they would have nothing to live on if they resigned. But I must content myself today with the mere mention of these subjects as part of the composite picture.

Selection of Jurors

Here is one of our fundamental institutions; and most of us take the jury system for granted and go about our business. It is well to remember that trial by jury is gradually going out of vogue in England where almost all civil cases are now tried to judges alone; and there are many here in the United States who think juries are easily

bamboozled and that jury trials involve a lot of waste of time and effort.

I happen to be one of those who believe in the jury system; I believe in our people and I trust them. From my point of view laws permitting majority verdicts—as in New York where in civil cases a vote of 10 jurors is sufficient for a verdict—represent a disintegration of the jury system. I would insist upon a unanimous verdict in all cases, civil and criminal; and I would abolish Blue Ribbon juries wherever permitted by State law. Fortunately we do not have especially selected panels in the federal system. Moreover, service as a juror helps to train men and women as citizens of a free country and is one of the things that makes American democracy work.

But all this depends upon getting the right type of juror, and giving jurors during their period of service and during their deliberations proper accommodations and proper protection. It is surprising how little attention has been paid to these important matters by legal scholars.

The fundamentals are simple enough. Jurors should be honest and possessed of sufficient intelligence to understand the issues as submitted to them by the judge; and they must be selected in a manner reasonably calculated to produce in the general jury panel a fair cross section of the community.

Perhaps it was inevitable that the methods of selecting jurors should vary so much as they do. After all there are essential differences between urban and rural communities, and local conditions even in adjoining counties often justify quite different methods of approach.

But there must be some systematic weeding out process by the commissioner of jurors or whoever it is who does the selecting. A good definition of a fit juror is, one who is "physically and mentally healthy, possessing good reputation for honesty and morality; with at least enough education to be able to read, write and understand English; and finally of sufficient intelligence and experience in life to be able to understand the various problems presented in both civil and criminal litigation."

I was told when in Louisville a few years ago that it was not uncommon to have the official go out on the street and corral a few jurors every once in a while.

During the depression years it was mighty difficult, at least in New York, to get a jury not composed of 12 unemployed persons.

The suspicion is sometimes expressed that some prosecutors have stricken from the jury rolls all persons who have voted for a verdict of acquittal.

There is always some likelihood that workers for a daily wage may not be able to afford to serve as jurors where the jury fees are too small, and that business men and others who would ordinarily make excellent jurors beg off with one excuse or another.

When I presided over the trial of the eleven Communist leaders we had a panel of some 300 odd jurors to pick from. The first thing I did was to ask those who did not wish to serve to give their excuses. The result was that every single business man or woman or person with a position of responsibility asked to be excused. I was positively ashamed. True, it was likely to be a long trial, but in a democracy such as ours we must all make some sacrifices.

One of the soft spots is the almost incredible number of exemptions from jury duty provided by the laws of the various States. There is no uniformity about these exemptions but viewed in the large they include; lawyers and their clerks, stenographers and secretaries; physicians; dentists; pharmacists or druggists; embalmers, undertakers, morticians or funeral directors; optometrists; chiropractors and osteopaths; veterinarians; nurses; teachers and professors; clergymen; certified public accountants; actuaries, newspaper reporters, editors, publishers, printers and linotype operators; radio announcers and engineers; certain railroad employees; seamen, pilots and steamboat personnel; ferryboat men, employees of telephone or telegraph companies; express company workers; bank tellers, cashiers and bank presidents; millers; government officials; firemen; national guardsmen and militiamen; police; attendants in institutions such as almshouses, state hospitals and asylums; mail carriers and postal employees; jail employees; fish and game wardens; forestry agents; customs house officers; coroners and overseers of roads.

This doesn't make sense, does it? Everyone with a legitimate reason may be excused in any event. These exemptions should be cut down radically if we are to get the best possible jurors. And we need the best qualified jurors just as we need the best qualified judges.

I could go on talking about the jury system for hours; but what I am trying to do is make you aware of the problems so that whenever the occasion may arise you may put your shoulders to the wheel and work for improvements.

Business Management of the Courts

The administration of justice in the United States is big business. The number of judges, commissioners, bailiffs, attendants, secretaries, criers and miscellaneous assistants runs into the thousands in the federal and state judicial establishments. There are all sorts of dis-

bursements for salaries, maintenance of buildings, travelling expenses, books and supplies and the keeping of records.

Every successful business has a business manager who knows the conditions of his business and then plans for the future. He knows his inventory at any given time; he knows the amount of income and outgo; he knows the speed of operation. Also he knows his personnel and the workload in each department. He has meetings of his officers and department heads to consult about the condition of the business as a whole. It seems elementary that there should be similar good business management of our judicial establishments. But, by and large there is not. This is one of the most pressing of all the present day problems of judicial administration.

The source of the difficulty is pretty plain. In many of the states with large populations and with their roots in the colonial period, such as New York, Massachusetts, Pennsylvania and Virginia, the judicial system is composed of a vast number of courts with various jurisdictions, each jealous of its own independence and anxious to keep external control down to a minimum. The judges of these various courts differ widely in ability, industry and experience. In some localities the dockets are traditionally congested, sometimes as much as four or five years in arrears; in other sections there is little judicial business and the pressure of work is much less exacting. Control over the financing of these various courts rests in a great variety of public bodies, and political considerations have great weight in the making of many of the appointments of court personnel. There is no way of estimating the amount of waste but it must necessarily run into large figures. No commercial business could be successfully conducted in such a haphazard way and without some executive and administrative control.

The ideal way to deal with this situation is the combination of a single integrated state court, such as exists in New Jersey, supplemented by an Administrative Office or Director, acting under the order of the Chief Justice. With such a set-up the number of courts is reduced, each has charge of a given segment of the judicial caseload, and shifts can readily be made whenever there is more or less work to be done in any one of the various divisions or departments, or where certain judges have exceptional skill and experience in a certain type of work. The effect in New Jersey has been almost unbelievable. With 20 per cent less judges after the new Constitution of 1948 took effect, 90 per cent more cases were disposed of in the first year of operations and an additional 20 per cent in the second year. Practically all the

dockets were brought up to date and delays in the disposition of cases disappeared.

Naturally this was not accomplished without a good deal of weeping and wailing and gnashing of teeth. Lawyers by constitutional habit are disposed to put cases off again and again, and the judges like to see a little light ahead. But there was general rejoicing by the public at large.

The way improvements are generally made is by the tinkering process. Whenever conditions get so bad as to approach the point of a public scandal, action is taken reshuffling the cards to some extent, permitting a limited assignment of judges to some court other than their own or increasing or limiting the jurisdiction of one of the courts having some special jurisdiction. But the real answer is a single integrated state court with a Chief Justice at the top with power to act.

In the federal system the Administrative Office of the United States Courts, created in 1939 by the Administrative Office Act, has done a magnificent job. It is charged with the duty of setting up and presenting the budget of the courts to Congress, after approval by the Judicial Conference of the United States, of auditing the accounts of Clerks of Courts, United States Commissioners, the Referees in Bankruptcy and other officials in the court system, of furnishing the judges with supplies, law books and equipment, the accumulation of statistical data and the making of reports on calendar conditions and the arrears of the particular judges; and it acts as a sort of secretariat or agent for the Judicial Conference. As a matter of fact the influence of the Administrative Office goes beyond the business routine and is exerted toward sound standards of performance by all those coming under its supervision.

By setting up the Judicial Conference of the United States, presided over by the Chief Justice and composed of the Chief Judges of the Courts of Appeals of the eleven circuits, supplemented by the Judicial Councils, and the Judicial Conference of the Circuits, which I shall not pause to describe, there is provided opportunity for discussion of the miscellaneous problems of the courts and for the making of suggestions for improvements in the administration of justice in the United States Courts.

The success of the Administrative Office has been so widely recognized that movements have been started in many of the states in recent years to adapt it to local state conditions. A state may take as little or as much of this federal prototype as it may desire or as it may be in

a position to finance; and this flexibility has been one of the most attractive features. The terminology often reflects a certain amount of local pride, and we seldom see the man in charge called the "director." More often he is the "assistant to the Chief Justice" or the "executive secretary" or something of the sort.

Finally under the heading of Business Management of the Courts, we come to Judicial Councils. They are not at all like the Judicial Councils under the Administrative Office Act which I mentioned a moment ago. Those consist of the Circuit Judges in each of the eleven federal circuits and they supervise the work of the United States District Courts in their circuit. Judicial Councils generally are bodies created by state law to gather statistics, discuss current problems and formulate studies and specific proposed legislation or proposed state constitutional amendments to implement suggested reforms in judicial administration. The membership of these Judicial Councils has often been composed of the head judicial officers of the highest and intermediate appellate courts, some members of the legislature, some leading lawyers and a few prominent and civic-minded laymen. Their influence has generally been good but not spectacular. Occasionally, as in New York, the Judicial Council, for one reason or another which has not been clear to me, gets at odds with the legislature and few of its recommendations are adopted.

This matter of business management of the courts is really one of paramount importance; but it is difficult to make it interesting and to get people excited about it. Lawyers and bar groups generally bog down in matters of detail, and so many ways of doing the job are suggested that nothing whatever is accomplished. The secret of success, I think, is in leadership and cooperation with the lay public. That is how Chief Justice Vanderbilt beat the opposition in New Jersey.

Judicial Regulation of Procedure

Here is another tough one and it really should not be tough at all. Lawyers and judges who come here from other countries are simply amazed to find one system of procedure in the federal courts and about twenty-five other systems of procedure flourishing merrily in the various state courts. Of course it was worse under the old Conformity Act, when you never could tell how much of the local procedure was in force in the local federal courts.

What a boon it would be to have a single uniform system of civil and criminal procedure applicable throughout the entire United States! Some day we shall see it. Nothing is impossible. We finally got rid of Prohibition.

The way to do it is to have each law school conduct a basic course on Civil Procedure founded upon the Federal Rules of Civil Procedure. The local practice should be subsidiary and incidental. After all it is hard to imagine a successful lawyer without some cases in the federal courts. The Federal Rules must sooner or later be mastered; and in my judgment they represent the very best we have. Grounded in these Rules the boys and girls who go out from the law schools every year will sooner or later have positions of sufficient influence to do the trick.

There never was any sense in the promulgation of an infinite variety of procedural details by the legislature. Competence and disinterestedness in such matters are in the judges; and the judges of the highest court of a state, aided by an Advisory Committee of lawyers, who consult with and receive suggestions from the bar generally, are the people to whom this important task should be delegated. As long as the legislature has control of matters of procedure there will continue to be the usual pulling and hauling, lobbying and so on, with a few jokers popping out every now and then which look innocent enough on their face, but which always turn out to benefit some special interest.

I have lived to see effort after effort to obtain a short and flexible practice act and rules defeated in New York. The judges do not want the Federal Rules, the lawyers do not want the Federal Rules. But the day will come when the people will stand up on their hind legs and follow some crusader who wishes to be done with these masses of technicalities, and they will go. That is where the spiritual part comes in. When the fire within burns brightly, the impossible becomes easy.

It is high time that the students and the professors in the law schools become aware of the pressing problems of judicial administration. What I have been describing in this very sketchy way is part of the Program of the Section of Judicial Administration of the American Bar Association, of which I was Chairman a couple of years ago. Just get together with that crowd some day if you wish to see a group of men dedicated to the cause of justice. Judges like Arthur Vanderbilt of New Jersey, John Parker of North Carolina, Ira Jayne of Michigan, Bolitha Laws of the District of Columbia, Charles Clark of Connecticut, James Douglas and Lawrence Hyde of Missouri and your own Edward Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia; law professors and law school deans like Seasongood of Cincinnati, Pirsig of Minnesota, Cheatham of Columbia, Sunderland of

Michigan, Storey of Texas, Harno of Illinois and a host of others, to say nothing of lawyers like Harry Nims of New York and others from almost every state of the Union.

You should know more about the Minimum Standards of Judicial Administration for which the Section has been fighting so manfully. Just look up some of these names I have just mentioned in the law library and read some of their books and their law review articles. These men are fearless, they are independent, they are disinterested—and they believe in America, as I do.