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Assuring the Adversary System

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THE TYRRELL WILLIAMS MEMORIAL LECTURE

The Tyrrell Williams Memorial Lecture was established in 1948 by the family and friends of Tyrrell Williams, a distinguished member of the faculty of the Washington University School of Law from 1913-1946. Since its inception, the Lectureship has provided a forum for the discussion of significant and often controversial issues currently before the legal community. Former Tyrrell Williams Lecturers include some of the nation's most distinguished legal scholars, judges, public servants, and practicing attorneys.

The Honorable Griffin B. Bell, distinguished jurist, public servant, and prominent attorney, delivered the 1983 Tyrrell Williams Memorial Lecture on the campus of Washington University in St. Louis, Missouri.

ASSURING THE ADVERSARY SYSTEM

Griffin B. Bell*

Prior to the American Revolution, Sir Edmund Burke warned Parliament that the lawyers in America were numerous and powerful, and also leaders. He observed that Americans are all interested in law, and that nearly as many copies of Blackstone's *Commentaries on the Law* had been sold in the American colonies as in the whole of England.

Within fifty years after Sir Edmund Burke's statement, Alexis deTo-

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queville was in America preparatory to writing *Democracy in America*. In it he said:

> Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate . . . . The lawyers of the United States form a party which . . . extends over the whole community, and . . . penetrates into all classes of society; it acts upon the country imperceptibly, but . . . finally fashions it to suit its [own] purposes.[1]

DeToqueville made lawyers out to be a form of ruling class—an aristocracy, trustees of a public trust.

How have the lawyers of America in the intervening century-and-a-half honored this trust which they assumed? For it is a trust. We have no perpetual franchise to practice law as it is now practiced. We have a monopoly but it is not guaranteed.

The courts are jammed; there are great delays in obtaining justice. Justice is expensive, and there is little finality in criminal law.

Every dispute seems to end up in court. There are many frivolous cases in the trial courts; there are many frivolous appeals. In recent years there was a suit by a state prison inmate whose hobby kit, worth $23.50, was lost by prison officials.[2] There was a suit by a prisoner for seven packs of cigarettes and ensuing appeals in the federal courts.[3] A fireman, dismissed for growing a goatee, won damages and filed two appeals over attorneys' fees.[4]

There is no longer any doctrine of de minimis in the law. The old rule that the law does not deal with trifles has itself become a trifle. A lawyer friend told me recently that he and his two sons were making a good living in a middle sized southern city defending insubstantial and frivolous lawsuits.

The in forma pauperis case has the day and there is no way to discipline that part of the docket except by sanctions against lawyers. Those who can pay can be disciplined through the imposition of attorneys' fees, or other costs, as the losing party.

There are many current causes for the litigation explosion, such as crowded living conditions, more complex lives, and an automated, mechanical society. There are many new rights, both criminal and civil, effecting an evolution in the quality of life. But we in the law

1. A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 284-85 (H. Reeve trans. 1900).
2. Parratt v. Taylor, 451 U.S. 527 (1981).
3. Russell v. Bodner, 489 F.2d 280 (3d Cir. 1973).
4. Muscare v. Quinn, 680 F.2d 42 (7th Cir. 1982).

must take the situation as we find it—a *fait accompli*. We cannot wait on solutions to the causes. We must take the necessary steps to accommodate our system of law to the need for law. Our aim cannot be for order or an ordered society, but rather, in the words of Justice Cardozo, a society of "ordered liberty."[5]

This requires methods of dispute resolution which are inexpensive, prompt, and meaningful. It also means discipline in the same system to the extent that trifles will be excluded and frivolous cases will not be suffered.

Judge Alvin Rubin, writing for the United States Court of Appeals for the Fifth Circuit, has recently added his strong and respected voice, echoing the need for discipline against the insubstantial cause. The court had before it a suit brought by a child who had been penalized on a six-weeks' algebra grade for an unexcused absence.[6] The teacher had altered her grade point average from 95.478 to 95.413. The student brought a suit claiming that she had been deprived of a vested property interest. The district judge decided in her favor and ordered the teacher to restore her grade.

Judge Rubin went to some length to reverse and did so by saying that the so-called property right was patently insubstantial. But, of even more importance, he said:

> Federal courts are proper forums for the resolution of serious and substantial federal claims. They are frequently the last, and sometimes the only, resort for those who are oppressed by the denial of the rights given them by the Constitution and laws of the United States. Fulfilling this mission and the other jurisdiction conferred by acts of Congress has imposed on the federal courts a work load that taxes their capacity. Each litigant who improperly seeks federal judicial relief for a petty claim forces other litigants with more serious claims to await a day in court. When litigants improperly invoke the aid of a federal court to redress what is patently a trifling claim, the district court should not attempt to ascertain who was right or who was wrong in provoking the quarrel but should dispatch the matter quickly.[7]

The adversarial system as we have known it is what is really at stake. There is growing dissatisfaction over delays and costs. One is left to wonder if the American people may not some day say to lawyers, as

5. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
6. Raymond v. Alvord Indep. School Dist., 639 F.2d 257 (5th Cir. 1981).
7. *Id.* at 258.

Oliver Cromwell said when he dissolved the Rump Parliament on April 9, 1654:

> It is not meet that you should sit here any longer . . . you shall now give place to better men.

Whether we can maintain our adversarial system will depend, in the main, on the quality of lawyers in the system. In turn, the quality of lawyers will depend on the leadership offered by judges.

Much will depend on the integrity and ability of the individual lawyer. And, when I speak of lawyers, I mean the trial lawyer, for it is the trial lawyer and the trial courts that serve as the dispute resolvers of first, and usually, last resort.

But there are so many lawyers today that one tends to stay in the pack and to practice by rote. Little time is spent on making the system better. Canon 8 of the Code of Professional Responsibility requires that lawyers work to make the system better.[8]

We know by now what the problems are; the Pound Conference in St. Paul in 1976 was a good beginning. Chief Justice Burger organized that conference and provided the leadership that set us on the road to improvement. The Pound Conference follow-up task force outlined the measures needed and assigned the responsibility for improvements.

The greatest improvement will come in the discipline that must lie at the heart of the practice. Rule 11 of the Federal Rules of Civil Procedure provides in part:

> The signature of an attorney constitutes a certificate by him that he has read the pleadings; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.[9]

Rule 11 is too frequently ignored in the interest of advocacy. How often does the lawyer stop to reflect on the presence or absence of the "good ground" for a suit or for a subsequent pleading? How many motions are filed and discovery proceedings pursued for the purpose of delay? How many depositions are taken without good cause but only as a form of offensive or defensive law practice where every witness within a certain ambit is deposed to delay or to extract a settlement?

Worse, how few judges have imposed sanctions under rule 11? How

8. Canon 8 provides: "A lawyer should assist in improving the legal system." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1979).

9. FED. R. CIV. P. 11.

many lawyers have sought to have sanctions imposed under the rule against other lawyers?

Of even more significance, why is there no counterpart to rule 11 in the rules governing appellate procedure? It is well known that a substantial number of the appeals filed in the federal system are without arguable merit—a polite way, in the language of the Supreme Court in *Anders v. California*,[10] of defining a frivolous case. Appeals, in many instances, are filed as a defensive mechanism, every lawyer knowing of the ease with which a defendant in a criminal case can charge his original lawyer with incompetence. This is a problem separate and apart from the inability of the courts to discipline the in forma pauperis docket.

Moreover, why is there no counterpart to rule 11 in the Federal Rules of Criminal Procedure? Why should a prosecution be brought unless the evidence presented to a grand jury would be at least "likely" to produce a conviction? Such a policy was invoked at the Department of Justice of 1979. This meant that a prosecutor would not seek an indictment when he had only enough evidence to defeat a defense motion to dismiss at the close of the government's case in chief—a time when such motions are routinely made. This is a higher standard than probable cause. It requires the probability of a conviction. This would eliminate the marginal case and spare those defendants the agony and expense of indictment and trial.

There are signs of progress. The rule 11 concept is spreading. Even the ABA Proposed Rules of Professional Responsibility for Lawyers address the problem. Moreover, changes in Federal Rules of Civil Procedure 16(b), 26(b), and 26(g) now require case "procedure programming" by the federal trial judges, controls over discovery, and certificates by counsel that discovery requests are reasonable. Hopefully, case programming and discovery will be oriented to pre-discovery settlement of issues.

Professor Sander of the Harvard Law School, speaking at the Pound Conference in 1976, had a vision of a "multi-door courthouse" in which one would find a screening desk from which the prospective litigant would be referred to a mediation room, an arbitration room, a fact-finding room, a malpractice screening room, an ombudsman, or a courtroom. He also thought that institutions such as prisons, schools,

10. 386 U.S. 738 (1967).

and mental hospitals might establish their own dispute resolution processes.

As a start, Congress could require meaningful exhaustion of state prison remedies for the thousands of prisoner cases which enter the federal court system. There is such a requirement for federal prisoners. The 1980 congressional effort in this regard remains insufficient.

In the end, however, when every innovative measure has been taken, and every lawyer has become faithful to the rule 11 concept, and all rules of practice have been modernized, there will still be the need for the able judge. It will be the judge who can manage a system or a docket, or a case—and particularly a case—who will save the system. Judges will need to be better managers and more highly skilled in employing the tools of judging. Cases will need to be controlled so that there is adequate discovery, but not overkill in discovery. The status conference and the settlement of issues will become the order of the day. It will be too late to manage cases once there have been abuses in discovery or in motion practice.

I recently received a letter from a busy lawyer in a midwestern city who is disturbed over the waste in discovery. He sent me a copy of a letter which he had written to the president of the local bar asociation, in which he said in part:

> I spend well over half my time on patent and trademark litigation in federal court, and in my opinion the amount of time devoted to discovery by the average firm is at least five times, and often ten or twenty times, more than should be necessary to achieve any legitimate objective. . . . I am concerned for the interest of the clients—clients with limited funds cannot gain fair treatment under a system which permits unlimited discovery. Even the larger clients are being cheated if the cost of discovery far exceeds any legitimate need. . . . Moreover, wholly apart from the cost to clients, excessive discovery and related contested motions create such a backlog that plaintiffs with legitimate claims cannot get relief. . . .
>
> . . . .
>
> If you should decide to create a new committee such as "management of discovery in federal litigation," I would be pleased to serve as a member. However, please do not consider me for chairman, as I am far too busy earning high fees, rushing from one deposition to another.

Ways will be found to prevent abuse. There will be a requirement for a showing not only when to begin discovery but also to show the scope of discovery. We will come to a system wherein there will be a required premise for discovery based on stated issues. Cost methods

will be invoked by which masters in costs will assess attorneys' fees and costs against lawyers for every deposition taken needlessly, or for motions filed without due cause.

Ways will also be found to accommodate modern discovery to the jury trial. The antiquated one hundred mile restriction on witness subpoenas will be changed in the interest of truth, under certain safeguards, so that the jury can see and hear the witnesses.

But where are we today? The judges are better than ever. They are more carefully selected. They are better trained—at the Federal Judicial Center, the National Center for State Courts, and the National College for the State Judiciary, all institutions established in the recent past. And, I believe that the trial bar has vastly improved over the years of my practice.

In addition, the litigation section of the American Bar Association, as well as the American College of Trial Lawyers and other organized lawyer groups, are working to minimize discovery abuse, eliminate the frivolous case, and control the strike suit (including the class action strike suit), and excise all of the other banes of the adversary process. These efforts are designed to make room for the meritorious case and also to take care that none will be denied justice.

It is the duty of every lawyer and every judge to join in the effort to ensure that our system of justice will not only survive but that it will be enhanced. Faulkner, accepting the Nobel Prize for literature, said: "The human spirit will not only endure; it will prevail." I have the same feeling about justice and the role of trial lawyers and judges in seeing that justice is done, in the proven environment of our adversarial method of determining truth.