Denver Law Review

Volume 23 | Issue 10 Article 3

July 2021

The Layman and the Courts

Jack Foster

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By JACK FOSTER *

As a newspaper reporter for a quarter century, I have sat before you—or your colleagues on other federal benches—on many a grim and dramatic occasion.

I have listened with awe, exhilaration and occasional cynicism to the conclusions you have reached, to the decisions you have rendered.

But it never occurred to me that any one of you would ever be interested in hearing what I—the story teller for the multitudes, the casual reporter to the masses—would have to say. You rest so securely within the shadow of the eagle, within the comforting arms of life-time appointments that I had come to believe, I'm afraid, that your world was yours and mine was mine, and never the twain could meet.

You are impregnable, I thought, within the rough-hewn castle of federal law.

I as a newspaperman am a shifting mirror that catches the changing colors of human life.

And so, with such different purposes in the world, I was frankly puzzled when Judge Orie Philips invited me to speak before you gentlemen this morning. I was puzzled because I could not see what I might have to say would be of any value to you in the technical discussions of law and legal procedure that are to follow.

And yet the more I thought about it the more I realized that unless there is some bond between you, the federal judges, and me, the layman, there is no law—and without law there is no America—and without America there is, in this moment of history, no possible civilization assuring justice to the individual.

We are gathered today within a few weeks of the anniversary of the end of a great war. That war was fought between the forces of those who believed that the right of the state is unquestional and those who declared that the state is subservient to the will of the majority.

The latter forces—our dying sons and grieving daughters, our little people from Tincup, Colo., from Okemah, Okla., from Pecos, N. M.,—won that war. But will their victory be lasting?

There are many factors involved in the establishment of permanent world peace. But none of them is more important than the crystallization of a strong America, and a strong America is not possible, in my opinion, without a human interpretation of law and a human application of legal procedures.

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† An address before a Conference of Judges of the Tenth Circuit Court of Appeals at Santa Fe, New Mexico, July 22, 1946.

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I do not pretend to know very much about law. But, like the gentleman who knows what he likes in art, I do know what gives me the ultimate thrill in the slow unfolding of the democratic processes. That thrill comes from watching an American jury in action. It comes from the realization that there, sitting in twelve well-worn chairs, are the baker and mechanic, the banker and housewife selected to judge the alleged offense of one of their neighbors against their community and his.

These little folk—these people from our midst—were the true enemies of Nazism and Facism. For they said, "We the multitude are capable of judging ourselves and no power of superstate or mouthing dictator can ever match our quiet strength."

But is the jury system—the bulwark of our Democratic life—functioning as satisfactorily as it should? Are the members of the jury as conscious as they should be of the overwhelming importance of their duty? Is the procedure for calling and picking a jury as smooth and efficient as it should be?

To get answers to these questions I talked with a number of gentlemen in Denver who have served within the last few years on federal juries. And I would like to tell you what they said.

There was the real estate broker. He is a busy man. He counts every moment as a precious thing that should not be wasted by sitting around all morning and perhaps all afternoon doing nothing. He felt that even if he might be permitted to walk up and down the corridor or to call his office occasionally, he would not get so restless. He felt that the judge was aloof to his problems.

There was the eminent businessman. His life is one that moves by the clock. He feels that there is an enormous amount of preventable waste of time on jury service. He feels that somebody ought to be able to let him know when there is the likelihood that a case will come to trial, and not to call him until that time. He has been on juries before, and he doesn't think that the judge gives a tinker's dam about him.

There was the erstwhile electrician. He has served on juries repeatedly and he likes it. He feels that he is performing an important function, and he is invariably disappointed when he is dismissed before a jury is impanelled. But he admits he has plenty of time on his hands, and he feels that a closer check should be kept on the time of cases coming to trial for the benefit of busy men.

And then there was the laboratory assistant. He admits that there are maddening delays in jury procedure. He admits that overcrowded court facilities frequently make service distasteful. He admits that judges often give the impression of being utterly indifferent to the proceedings. And yet he declares he would be fearful of the possible results if jury selection were placed on a rapid-fire cafeteria-style basis. He said:

"Yes, I dislike the delay. But still I think the slow, deliberate process of jury selection leads to the greatest possible justice to the individual."

I was talking with this gentleman in the company of a distinguished Denver lawyer. At the beginning of his career this lawyer was serving as deputy in the district attorney's office. He told a story of the fearful results that can follow over-hasty judicial procedure in capricious courts.

He was prosecuting a man a man who was accused of the rape of his half-wit niece. Under pressure, the jury was completed sooner than expected. And the prosecution was without witnesses in the courtroom. So the judge dismissed the case, thereby removing the defendant from jeopardy. Shortly after this the defendant's brother—father of the niece—shot and killed the defendant.

Said the lawyer:

"And then it was my job to try this man for murder—all because the first trial was rushed too hurriedly."

There are those jurors, to be sure, who grow impatient with the slow development of courtroom procedure. And in my opinion there is no question about the fact that in instances this procedure can be speeded up without jeopardizing the goal of justice.

In this connection I fervently regret that I was not able to hear the speech by your distinguished colleague, Chief Justice Laws of the District of Columbia. If my own talk had been better prepared and didn't need the rewriting that frequently comes with re-reading in the cold light of dawn I should have been able to have been here. Chief Justice Laws has earned ardent distinction for his work as Chairman of the American Bar Association's subcommittee on Improving the Administration of Justice and I am confident he touched extensively on the question of jury procedure improvement.

But perhaps he didn't enlarge on the human side of jury service. As a newspaperman, it is difficult for me ever to separate a problem or institution of any kind from its human aspect. That's the way we have to tell a story—through people—if we wish our readers to understand it.

In 25 years as reporter and editor, I have talked with hundreds of jurors. I have listened to their woes, have heard them express their fears, have watched the troubled lines of regret cross their faces as the foreman handed in a verdict of first-degree murder.

Many of them were serving unwillingly. They deplored their loss of time and money.

Many of them had pleaded fervently to be excused—on real and, in many cases, fictitious reasons.

Some of them, of course, were the more or less professional jurors who are interested only in the excitement—and fee—of the particular case they are hearing.

And yet I have found, from watching hundreds of jurors in action over the years that, when they actually come down to the job of hearing a

case, they are conscientious, solemn, deliberate and long-suffering citizens. They realize fully the seriousness of the assignment as citizens that they have. Despite the inept and incomplete discussion of the high importance of jury service on the part of some judges, they seem to know that this is a great and fundamental privilege of all Americans. And, as a rule, I have found, they reach a decision that is a tolerant, reasonable, in keeping with the average thinking of the community.

As laymen, they do not attempt to interpret the law.

They seek only, it seems to me, to offer justice to a fellow member of the human race who they believe has as much right in the courtroom as they do. They are not primarily concerned as to whether the prisoner before them ought to be in jail. If he should be, they find him guilty. If they think he shouldn't, they acquit. The issue is as simple as that in the mind of the average juror.

In this connection, I am thinking about a case in federal district court two years ago that absorbed my interest because of the uniqueness of the charge. It was a case involving treason. It was a case in which three Japanese-American girls in a relocation camp in southern Colorado were charged with treason and conspiracy to commit treason.

One of the distinguished gentlemen in this audience will remember the case well. He tried the case. He had difficulty, as all of did, in pronouncing the last name of the leader of the defendants. And so he resorted to referring to her by her nickname—Toots. It was, I assure you, a rare privilege to hear a federal district judge from this bench of highest dignity refer to a defendant as "Toots."

But, at any rate, these Japanese-American girls were accused of having helped two German prisoners of war escape from a nearby prison camp. It was clearly obvious to the jury that they were guilty. But it likewise was obvious that they had helped these men escape out of bitterness, anger and despair because they had been torn away from their California homes—not in an effort to hinder our country's war effort.

So the jury found them innocent of treason and guilty of the lesser charge of conspiracy to commit treason. It was a contradictory verdict, to be sure, yet one that, in my opinion, was entirely within the thought of a tolerant and reasonable community. To me this federal jury was carrying out its responsibility in the highest sense of the word.

It was revealing in a practical way the truth of the phrase in one of the reports of the Section of Judicial Administration of the American Bar Association, adopted in 1938, which you gentlemen will remember says:

". . . trial by jury is the best means within our knowledge of keeping the administration of justice in tune with the community."

But do the judges on the federal bench maintain, without exception, this humanness that is an inseparable part of a jury when it is functioning best.

By their mannerisms in the courtroom, by their attitudes toward the jury, the lawyers, the working press, do they carry across the essential idea that the law, above all, is a human instrument, and they are human prophets of this law?

Sometimes reluctantly I doubt it. Jurors and lawyers alike have recounted to me examples wherein it seemed to them that federal judges have acted in an unnecessarily aloof, seemingly "better than thou" manner.

Just before I left Denver on the beautiful flight to Santa Fe I told a friend that I was to speak before you gentlemen on "The Relation Between the Federal Courts and the Layman."

He replied caustically: "Is there any?"

He was a newspaperman. He was thinking, I am sure, of a certain rule that exists in the federal district court in Denver. At least it's annoying to us newspapermen—and I have wailed on occasion to my good friend, the district judge, about it.

This court is only one of several types of offices and bureaus within a large federal building. Several years ago, for some reason I do not know, the federal district judge, now gone after years of faithful service to the highest tribunal in the heavens, decreed that at least so far as newspaper photographs were concerned the entire building came within his jurisdiction. No photographs of defendants might be taken anywhere in the building.

This rule has been perpetuated by the distinguished present district judge. A short time ago the newspaper of which I am editor forgot this rule and took a photograph in the marshal's office. This was during a recess of the trial; it was far from the courtroom; the defendant had readily given her consent. Yet we were threatened with contempt of court by our friend and otherwise pains-takingly helpful district judge.

Personally I feel that in the event we had been cited for contempt and had fought the case—as we certainly should have done—we would have won. I personally believe that such citation for contempt on these grounds would have been a violation of the constitutional guarantees to a free press. But that is not the point. The point is there here again, in my humble and perhaps prejudiced opinion, is an example of a federal judge holding himself unnecessarily far apart from the public and the press, assuming to himself what seems to me to be unnecessarily arbitary powers.

If the taking of this photograph had interfered with the processes of obtaining justice, then, of course, contempt was involved. But if it hadn't—and, of course, it hadn't—then what reason was there for even the threat of invoking this rule?

Yet I am, I like to believe, a human being myself, and if I were in the position of authority that tradition gives a federal judge I am not sure that I might make some rules of my own. There is, I suppose, by the very nature of events, a greater aloofness on the part of the federal judge than there is on the part of the state judge.

The federal judge sits on the bench for life unless Congress removes him for some flagrant offense. (And what federal judge could possibly wish to disappoint Congress after their most commendable act of last Saturday?'

The state judge, of course, sits at the will of the electorate.

With such a setup, if I might use the word, you gentlemen are naturally not as concerned with the cry of the multidude or the hue of the press as you might otherwise be if the shadow of November were just ahead of you.

I am not saying that this is not a good thing. The necessity of pleading with the public for votes every four or six years is a grim and debilitating ordeal. I don't blame you for the rosy satisfaction that you must take out of the knowledge that yours is a "til death do us part" marriage.

But when this satisfaction tends to blind you to the human factors in the courtroom, as it conceivably can, then I think a great deal has been lost. When this sense of security makes you inconsiderate of the none-too-bright defendant—the annoying lawyer objecting with the force of a house-fly, the blundering witness—when you brush aside these human irritations with an arbitrary sweep of the hand, then the law suffers, I believe, immeasureably.

For the law must be human if it is to be a law of justice. And the interpreters of that law must be human and reasonable themselves if they are to serve faithfully the ends of truth.

There are two possible kinds of law. The law of tyranny. And the law of justice.

If the law becomes high-handed, arbitrary, oppressive, tyrannical, then it breeds fear, distrust, confused resentment and subversiveness in the hearts of the people. If, on the contrary, the law with high resolve dedicates itself to the pursuit of justice—not revenge—to the search for a fair balance of human truth—not punishment of its own sake—then the law becomes the great and gleaming hope in a chaotic world to which the people can cling.

I am thinking of a little story of a simple person to illustrate this fervent faith of mine. This was the prohibition era. An Italian woman had been brought before a federal district judge for having sold some wine. She was a widow, the mother of five children. It was her second offense.

The district attorney, with all the majesty of revenge in his soul demanded that she be given the limit. But the federal judge, after listening to his high murmurs of indignation, said:

"And so you are through. All right, sir, answer me this? If I should give this woman a long sentence, who would care for her children? Who would feed them? Who would clothe them? Who would give them even a small chance to become constructive citizens in society? No, my dear sir, my job is not to punish. My job is to render justice."

He gave this woman a meager sentence. And he was right. And the public, who read the story in our newspaper, believed that he was right. And

the law, through this simple act of granting justice to a little person, gained new glory, I think, in the minds of our people.

Since I first accepted this assignment from Judge Phillips to speak before you, I have been thinking more profoundly than ever before about what it seems to me is—or should be—the essence of law.

And I have been talking to myself, as men will, when they are struggling to some conclusion. And I have been saying:

"Law is a measuring stick of conduct. It is the rule established by men of good will to produce the greatest contentment to the greatest number in a world that otherwise would have no order. But it is not an end unto itself. It is rather an expression of principles that change as history changes, that shift as the need for mercy and charity increase.

"Brought into existence by the mind of man, the law has all of man's frailties. Therefore, being strong in one generation and inadequate in another, as the races of men are, it must be subject to perpetually changing interpretation. But, throughout these changes in interpretation, it must always have as its indestructible goal the burning resolve that the lowliest of man can come before it and be judged without prejudice, without malice, without contempt. The law is—or should be—and must be—the unassailable faith of a free people who voluntarily have accepted these restraints so that none of their number need go to the grave with the black belief that life was set against him."

As a matter of fact, I have said to myself, the law should be interpreted primarily to the ends that justice comes to the poor and lowly, the sick and forsaken. The great do not need the law. They, by virtue of their wealth, could be mercy unto themselves, could be judges without need for rules. It is the lowly above all who need the warm, encircling arm of law—and for them, and their rights as free born citizens, the law primarily should be concerned.

Fortunately judicial evolution has been in this direction during recent years—certainly during the last quarter century. Over and over again the Supreme Court has ruled that human rights are far more important than property rights, and this point of view has spread through a great part of the federal judiciary.

The Supreme Court, as spokesman for American justice, time and again has concurred with the late Justice Brandeis in his eloquent expression of faith that:

"The door of the court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as the most virtuous fellow citizen; no record of crime, no matter how long, makes one an outlaw."

Whenever there has been evidence that tortuous third-degree methods have been employed, the Supreme has on most occasions, as you gentlemen

know, ruled in behalf of the accused, even though he might by guilty. "The wrack and torture chamber may not be substituted for the witness stand." This was the view of the late Chief Justice Hughes. And in McNabb vs. the U. S. you gentlemen will remember that the third degree was called by the Supreme Court for what it is: "An easy but self-defeating way in which brutality is substituted for brains as an instrument of crime detection."

No, says the Supreme Court—the Wisconsin policeman who beat a confession out of a man, the Michigan officer who hung a skeleton in a room to obtain a confession, the Florida authorities who chained a defendant overnight in a mosquito infested cell and questioned him the next day with the scalp of a dead woman at his feet—no, these shall not rule the land, declares our highest tribunal.

Furthermore, in searching for other examples of the defense of human rights, I was amazed to find that the Supreme Court of the United States during one war year issued 125 writs of certiori, calling for review of convictions of a relatively small band of people known as Jehovah's witnesses. These cases sprang, as you gentlemen know, for the most part out of police courts and involved only small fines. Yet the Supreme Court, which denied to review matters involving millions of dollars in property, felt that the human rights of the individual must be defended at any cost.

Why am I citing these instances in a speech presumably about the relation between the layman and the courts? I am citing them as an affirmation of my belief that a human court is the only fortress we've really got in the everlasting struggle of mankind to maintain, as Justice Brandeis said, "the right to be let alone." A human court, therefore, is the only true relation that does exist between the people and the law.

Goodness knows, it is regrettable that personal differences among certain members have shaken the belief of some people in the integrity and authority of the Supreme Court . Yet leaving all personalities aside, and looking only at the record, this High Tribunal of ours has established in recent years examples of the application of principles of freedom for the individual for which, in my opinion, we shall be eternally grateful.

As this conversation with you comes to an end, let's look at a recent case involving that strange and curious cult, the Great I Am. The leader of the Great I Am came into the Supreme Court with a conviction for having accepted money for allegedly fraudulent revelations. But said Mr. Justice Jackson:

"The wrong of these, as I see it, is not in the money the victims part with half so much as the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish."

A good deal of rubbish comes into your courts, I am certain, gentle-

tlemen—much of it in the form of objectionable human beings. I am sure that most of you wish that it had been cast aside somewhere along the way before it got to you. And yet sometimes I think that the dignity and human splendor of the law depend to a great extent on how the court disposes of its rubbish. For it is through the handling of such cases that the court has the opprotunity once again to state the human principles on which true law flourishes—and in the restatement of these principles the judge is brought closer to the layman, the layman closer to the judge.

And that is as it should be. For the layman and the judge are in reality the same—they are free people seeking, by tolerance and humanity and wisdom, to keep the law a true guide to fruitful lives during the few years God has alloted us all.

Gentlemen, I realize I have spoken far longer and with less exactitude than any newspaperman has a right to do. But do forgive me. For I never expect to have the opportunity of speaking again out loud before a distinguished gathering of federal judges—and I wanted to make the most of it.

Colorado Small Estate Law

By A. A. CLEMENTS *

There is a difference of opinion among members of the legal profession as to whether the provisions of section 77, chapter 176, 1935 Colorado Statutes Annotated, authorizes transfer of real estate of a decedent whose estate does not exceed $300.00 in value. [1] I have heard of no instance where the legality of the transfer of personal property under this section has been questioned. Some lawyers approve titles to real estate transferred under this section; others disapprove. This situation creates a confusion which detracts from the confidence of the public in the opinions of lawyers, and casts a doubt upon the legality of real estate titles so transferred.

Section 77 reads as follows:

> "In all cases where the estate of a decedent, or of a minor, shall be of the value of $300.00 or less, the court may, upon verified application by a creditor, or person interested in the estate, authorize the payment, transfer or delivery thereof in the case of a decedent's estate, unto the surviving spouse, or other heirs, or the creditors in the discretion of the court, and in the case of a minor, to the natural guardian of the minor, if such there be, otherwise to a next friend, appointed by the court, without the

* Judge of the Delta County Court.

[1] Editor's note: Real Estate Title Standard No. 37 of the Denver Bar Association reads, "Problem: Can Section 77, Chapter 176, C. S. A. 1935, with reference to estates under $300.00 be used to transfer title to real estate? Answer: No."