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AMERICAN CIVIL PROCEDURE: THE QUEST FOR JUSTICE

by E. L. Roy Hunt*

Jurisprudentially speaking, civil procedure, as contrasted with criminal procedure, has long been treated as a step-child in America, perhaps throughout the Common Law world. And this despite the comparative lawyer's frequently drawn contrast between the philosophical mind of the civilian, for whom the existence of a right implies a remedy, and the procedural mind of the common lawyer, concerned more with remedies and precedents than with rights.

The jurisprudential neglect of this area of our law seems all the more ironic because it is this very preoccupation with procedure in the everyday business of our courts which has given meaning to our substantive legal principles. This is strikingly illustrated by comparing the guaranties afforded by the constitutions of the United States and of Soviet Russia. On paper the similarities are far more striking than the differences; in practice these guaranties often prove illusory in the Soviet even as they are elevated to a preferred status in America. In this connection Professor Hazard has suggested that "the moral quality of a social order is mostfully revealed in its attitude toward procedural matters" and that "the disposition of a dispute by a court is a manifestation of a society's attitude toward the problem of applying its collective coercive power against individuals within it."

The answer lies largely in the American concern for "due process," a concept embodied in the Bill of Rights' Fifth Amendment: "No person ... shall be deprived of life, liberty, or property without due process of law." In the wake of the Civil War this guaranty of due process was made applicable to state action through adoption of the Fourteenth Amendment. It is no exaggeration to say that America's quest for justice may be traced in the continuing interpretation of this Fourteenth Amendment.

The breadth of the Amendment's dictates, never clear, awaited clarification in our own time. In the moral climate of the late nineteenth and early twentieth centuries the "due

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process" focus was upon "property" rather than "life" or "liberty" and the Supreme Court, equating "property" with the "freedom to contract," regularly emasculated social legislation as an interference with this "property" right, a result in harmony with the laissez-faire economic philosophy of the time. With the coming of the New Deal and the reluctant and somewhat belated judicial approval of its social legislation this focus shifted to the protection of "life" and "liberty" as elements of due process.

At about this same time it became fashionable to distinguish between "substantive" due process and "procedural" due process, a distinction never adequately drawn. In its broadest, and perhaps safest, formulation, "substantive" due process embraces such explicit Fifth Amendment prohibitions in the federal courts as double-jeopardy and self-incrimination and such positive guaranties as that of the Sixth Amendment's "assistance of counsel." And while there is still no consensus as to just which rights enumerated in the Bill of Rights are so basic as to demand protection against state infringement under the umbrella of the Fourteenth Amendment's "due process" clause, the trend has been steadily more inclusive.

In this substantive sense due process has received its due, both at the hands of the Supreme Court and of the commentators, lay as well as legal. Thus anyone who regularly reads the law columns of the popular news magazines must be familiar with the vast expansion of the right to counsel, a right which received its most significant expression in the famous *Gideon*(1) decision of 1963. The Supreme Court there held that the right to the assistance of counsel in a criminal trial could not be confined to those who could afford to hire their own lawyers, but that state courts were required to provide counsel to any defendant too indigent to retain one. Building on this decision, the Court in 1964 aroused a furor with its five-to-four murder conviction reversal in *Escobedo v. Illinois*,(2) announcing:

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(1) **Gideon v. Wainwright,** 83 S. Ct. 792, 372 U.S. 335.
The petitioner, Gideon, prisoner in the Florida state penitentiary, brought habeas corpus proceedings against the Director of the Division of Corrections of the State of Florida. The Florida Supreme Court, 135 So. 2d 746, denied all relief, and the petitioner brought certiorari. The United States Supreme Court held that the Sixth Amendment to the federal Constitution providing that in all criminal prosecutions the accused shall enjoy right to assistance of counsel for his defense is made obligatory on the states by the Fourteenth Amendment (as an element of "due process,"), and that state courts are required to provide an attorney to any defendant without means to retain one.

(2) **Escobedo v. Illinois,** 84 S. Ct. 1758, 378 U.S. 478 (1964)
Defendant Escobedo was convicted in the Criminal Court, Cook County, Illinois, of murder, and he brought error. The Supreme Court of Illinois, 28 Ill. 41, 190 N.E. 2d 825, affirmed. Certiorari was granted. The United States Supreme Court in a 5-to-4 decision reversed the decision below.

"Where as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied (his constitutional right to) 'the Assistance of Counsel' ... and ... no statement elicited by the police during the interrogation may be used against him at a criminal trial."

Many of the uncertainties inherent in *Escobedo* were settled in *Miranda v. Arizona,*(3) decided almost a year ago today. But it is the nature of the Common Law that each new decision will create its own new uncertainties to be resolved by courts conversant with the demands of contemporary society. How then do we explain such decisions as *Gideon, Escobedo,* and *Miranda*? And how do we explain the bitter dissents? Judge Kaufman of the Second Circuit Court of Appeals has suggested bluntly that the view accepted by a bare majority of the present Supreme Court stresses methods; the dissenters, representing the older and more traditional view, emphasize results "in terms of crimes successfully solved, defendants successfully convicted." More philosophically, Judge Kaufman suggests the newer view has come to prevail "because of the very nature of our system of criminal justice, which cherishes the dignity of the individual and at the same time recognizes the enormous disparity between an all-powerful state and a suspect accused of a crime.

This highly publicized line of cases points up the attention and the philosophical reflection accorded to those elements of due process labeled "substantive." These and like cases of the past three or four decades almost invariably involve criminal prosecutions.

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(3) **Miranda v. Arizona,** 86 S.Ct. 1602, 384 U.S. 436 (1966)
Defendant Miranda, a 25-year-old mentally retarded Arizonan, was convicted in the Arizona state court of kidnaping and raping an 18-year-old girl and received concurrent 20-to-30-year sentences. After having been identified in the police lineup by the girl, he had admitted the crime but he was not effectively warned of his right to counsel or that his statements could be used against him. Chief Justice Warren, speaking for the majority, held that statements obtained from defendants during incommunicado interrogation in a police-dominated atmosphere, without full warning of constitutional rights, were inadmissible as having been obtained in violation of the Fifth Amendment privilege against self-incrimination. In a bitter dissent, Justice White said: "More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. Thus the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight."

(4) Judge Irving R. Kaufman, "Miranda and the Police: The Confession Debate Continues," *The New York Times Magazine,* October 2, 1966, p. 37.

Yet the "due process" demanded by the Fifth and the Fourteenth Amendments is restricted neither to criminal cases nor to due process denominated "substantive."

But "procedural" due process, which deals with rules of court and their even-handed application, is by its very nature far less dramatic, and while it, like "substantive" due process, is restricted to neither the criminal nor the civil spheres of law, it smacks more of the everyday workings of the civil trial courts and is all too often dismissed as mere "legalism" by the layman.

The great majority of business of the American courts, however, is civil and it is precisely because the procedure involved in civil litigation is so regularly ignored for the more dramatic procedure of the criminal law that we shall focus upon American civil procedure in its own quest for justice.

It is tempting to pursue this quest through the distinction traditionally drawn in Anglo-American civil procedure between law and equity. And though there is danger in such a simplistic approach, I feel the profit outweighs the danger.

The distinction between law and equity must be sought in the system of law which developed in England following the Norman conquest in 1066(5). In the beginning were the courts of law. But these courts of law were divided between the king's courts and local courts controlled by the nobility, and a plaintiff who preferred to have his complaint heard in the king's courts had to purchase from the office of the king's Chancellor a writ, or royal command, which fitted the facts of his case and which required the defendant to appear in court.

During the formative centuries this system worked well enough since the variety of writs available grew much as a tree with ever more branches to fit each new set of facts. It is from this period that we derived the writs of forms of action which even today, and with some degree of accuracy, are said to rule us from the grave. But this growth entailed an increase in the jurisdiction of the king's courts which the nobility found intolerable. Thus, in the second half of the thirteenth century, under pressure from the nobility, the power to issue new types of writs was sharply curtailed. The result was a rigid, highly compartmented system of law. If one could not make his cause of action fit within the confines of an established writ, he could get no relief in the king's courts of law.

(5) For a lucid discussion of the development outlined above, see Karlen, *Primer of Procedure*, pp. 123-175. (Campus Publishing Company, P.O. Box 2091, University Station, Madison, Wisconsin, 1952.)

Such rigidity was unbearable but there remained the task of fashioning some new form of relief which would at once meet both practical needs and conceptual and philosophical demands. The solution lay in conceptualizing the king as the holder of all power and the fount of all justice. Since it was obvious to all that many wrongs were going unrighted, it was logical to conclude that the relief afforded by the king's courts of law exhausted only a portion of that power and that justice——that portion which could be tapped by means of the writs. The remainder was going unused.

The answer was inescapable. The king must use that great residue of power to do justice when relief at law was inadequate. For ease of administration the king began to refer petitions for this extraordinary relief to his chancellor, the chief law member of his council, with the result that he became known as the keeper of the king's conscience, dispensing justice from this reservoir as special circumstances demanded.

Inevitably such an attractive system of dispensing justice necessitated the establishment of its own court, the Court of Chancery, and by the end of the fifteenth century the courts of law and the courts of equity were locked in a battle for supremacy. The courts of law were strengthened in the struggle by parliamentary permission to develop new writs, but the power of equity and the Chancellor proved too strong and finally, in the famous Coke-Ellesmere confrontation of the early seventeeth century, the law courts were forced to acknowledge the supremacy of the courts of equity.

To the credit of all concerned and fortunately for the course of Anglo-American law, the Chancellor used his power with discretion and the law courts learned to value the extraordinary relief which equity could afford.

The distinctive characteristics of equity procedure have survived the centuries intact and would be entirely familiar to one today who is ignorant of their history. Chief among these features conceptually is the belief that equity, as opposed to law, operates directly on the person of the defendant. Thus, while the law courts' relief was generally restricted to money damages and while their judgments required the further step of execution by a sheriff, equity avoided the latter step and could issue directly either mandatory or prohibitory injunctions ordering the defendant to either do or refrain from doing certain specified acts. Most important of all, equity could punish a refusal by fine or imprisonment until the defendant purged his contempt. This was logically defensible since the chancellor of an equity court acted as the personal representative of the king; contempt against the king and was punished

accordingly. This, of course, was never true of the courts of law.

Of the other equity features still recognizable in today's courts, the most significant is the absence of a jury. Perhaps this absence is also attributable to the personal involvement of the king acting through his chancellor. It would be presumptuous to suggest the king needed a jury's advice or consent.

We turn then to colonial America. Not too surprisingly we find that this same dual system of settling grievances found its way into the colonies. What is surprising is the ease with which this system was received into both state and federal courts in the wake of our American Revolution. It is surprising because of the close relationship which equity had to the crown.

It might have been anticipated that a country which had just undergone such a revolution would wish to recast its law quickly from top to bottom. There is an historical basis for such a pattern. This pattern is reflected in the sweeping codes of the eighteenth, nineteenth, and twentieth centuries, codes which were intended to consolidate in part revolutionary legal principles.

Yet the American experience defies this pattern. The answer is simple. Americans were fighting in large part to enjoy the legal rights of Englishmen, rights denied the colonists. Thus the American Revolution protested discrimination against the colonials; it did not protest the legal rights and remedies enjoyed by Englishmen in England. Viewed in this manner it is not surprising that a system of remedies conceptually divided between law and equity was received into the new states and the federal courts even though the historical basis for dualism had little relevance to a kingless society.

Even so, for purposes of convenience and economy, both the federal courts and some state courts saw fit to have the same judicial officer wear two hats. The courts were conceived of as having two "sides," law and equity, and the officer acted as either judge or chancellor depending upon the subject matter. But it is vital to note that such an arrangement was acceptable conceptually only because the procedures and remedies of each system were kept distinct.

The difficulty with such a dual system was that the procedures of equity, originally intended to provide the flexibility lacking in the law courts with their writs, had themselves become rigid and formalized. This may be attributed to a way of thinking which enshrined the doctrine of precedent and inevitably applied it in equity, but the result was that "equity"

lost its original synonymity with "general justice" and "natural justice."

For a young and vigorous nation embarked on the great democratic experiment such rigidity was intolerable. The first great procedural reform occurred in New York. In 1848 it consolidated the rules of procedure by abolishing the distinction between law and equity and by substituting a single civil action for the various forms of action, forms based on the earlier writs. New York's example was emulated by California and some other states. Finally, in 1938, law and equity were merged in the federal courts. It is important to note, however, that the paths of law and equity, parallel for so many centuries, have not yet converged completely and, indeed, cannot. The right to a jury trial under federal and state constitutions generally extends only to cases formerly triable at law and not to those formerly triable in equity. Likewise, where there are both legal and equitable issues in a jury trial, the legal issues of fact are decided by the jury, the equitable issues by the judge. Such anomalies in American jurisprudence are explicable only historically.

1938 is procedurally significant for reasons additional to the merger of law and equity in federal courts. In that year, which has been termed the beginning of the end of an age of innocence about procedural problems, the Federal Rules of Civil Procedure were adopted. Professor Hazard has suggested that "these rules represented a victory of the legislative process over the historical process, a victory in which a long tradition of traditional rules was displaced in important part by a code of rules drafted on the explicit premise that rules of procedure must be defensible by reference to notions of policy and not merely by reference to accustomed usage."(6) These Federal Rules and the way of thinking they represent have in turn influnced nearly every state court to make similarly sweeping procedural reforms.

What is the policy goal by which our procedural rules henceforth must be tested? At the highest level of abstraction that goal is nothing less than truth. This is not to suggest that the pursuit of truth was held of no account prior to 1938. It is to suggest that procedural rules were ill adapted to this end. Ever since the days of trial by combat, there had always been a certain sporting element to litigation, both civil and criminal. Trials were considered contests between competing advocates, and if a clever lawyer pulled a trick or two that clouded the truth, that was the bad luck of the opposing side and not a flaw in the adversary system itself. All too often the case was decided on some technical nicety of pleading and

(6) Geoffrey C. Hazard, Jr. *Research in Civil Procedure*, Walter E. Meyer Research Institute of Law (1963), p. 3.

the basic issue was never really joined. Or the result hinged upon the introduction of a surprise witness. The premise was that the adversary nature of legal proceedings rendered such results fair.

The United States Supreme Court, acting on the proposals of a distinguished Court-appointed advisory committee and pursuant to a Congressional Enabling Act, promulgated the 1938 Rules of Civil Procedure; the United States Congress approved them. Such action, which amounted to a revolution in attitude and purpose underlying the conduct of litigation, reflects a recognition that the law should not seek to reward the diligence or cleverness of counsel at the expense of justice, that the element of surprise is untrustworthy, and that "trial by combat" to which the old procedure bore many resemblances too often favored the litigant with the greater financial resources.

Having decided that the sporting theory must give way to a more rational search for truth, the drafters of the 1938 Rules proclaimed this touchstone for intrepretation: "These rules... shall be construed to secure the just, speedy, and inexpensive determination of every action,[7]" thus recognizing explicitly that justice delayed is justice denied and that justice available only to the rich is no justice at all.

Almost thirty years have passed since these rules became effective, however, and if the preceding centuries have taught us a lesson, it is that even the best system of court rules cannot remain static. Thus advisory committees of practitioners, judges and scholars systematically and continually appraise the Rules in terms of how well they effectuate the goals proclaimed. If a Rule is found lacking, it is amended.

The procedural millenium has not arrived. Probably it never shall. Nevertheless these Rules and the merger of law and equity create a uniform procedure which is flexible, simple, clear, and efficient. This is no small accompilshment in the American quest for justice.

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(7) Rule #1, Federal Rules of Civil Procedure, 1938. (Found, among other places, on p. 463 of Karlen's *Primer of Procedure*. Also found in the United States Code and U.S.C.A.