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COMMENT

THE FITTING OF THE HANDCUFFS*

or

A Country Lawyer Looks at Law Reform

ROBERT T. DONLEY**

A modern Aesop began to write the fable of a vast corporation, self-chartered and named Society, Inc. The stockholders had acquired their shares by inheritance and were forbidden to transfer them upon pain of death. Each was required to spend his whole life in the huge plant of the corporation. He could work or remain idle, but the dividends he received had no necessary relation thereto. No one could remember how the corporation had been formed, nor could it be discovered what was its purpose. But the enormous plant was there, fully supplied with raw materials, machinery and labor, and a full head of steam in the boilers. Through unremembered ages it had been producing all sorts of articles, useful and useless, at some times more, sometimes less. Periodically, many of these were dumped into the sea without serious complaint from any but a few crotchety stockholders, because there never was any agreement as to what ought to be produced. From time to time, the stockholders became dissatisfied with the Board of Directors. When the situation became insupportable, the heads of the directors were chopped off. Undismayed, other stockholders eagerly sought election to the Board. Then, too, the stockholders formed cliques which were constantly at odds. Conferences were held which everyone knew beforehand would result in disagreement, but it was vastly entertaining. After the conferences had adjourned, each clique called upon God to witness the righteousness of its contentions and a horrible battle thereupon ensued. This continued until God revealed himself as agreeing with that group which happened to be victorious. An armed truce was declared, the dead were buried, monuments were erected, God was thanked impartially by both sides, the Board of Directors was notified and the General Manager hung out the sign "Business as Usual." No one ever discovered what had been accomplished.

*Speech delivered at initiation banquet of Phi Delta Phi legal fraternity, 1950.

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In the intervals between battles the plant went on producing. Since there was no agreement as to how much of what things ought to be produced, the Board was somewhat handicapped. It instructed the engineers to prepare blueprints for remodeling the factory and changing its products. The Board cared not a farthing what the change was: anything was better than what had been. What the stockholders desired was to be undisturbed. What the members of the Board desired was to continue to be the members of the Board.

In the engineering department, there were some who had adequate technical training but were low fellows without “vision”. Others had vision but no training. Still others claimed to be engineers having both training and vision, but the truth was they were engine-wipers who had forged their credentials and were given to loud talk. Everyone knew this, but nobody paid any attention to it. Each group prepared its own blueprints and stoutly maintained their exclusive validity.

In one corner of the factory was a glittering establishment called “Government”. There was no general agreement as to what it was expected to do, although, as may be gathered from its name, “Executive”, “Legislative” and “Judicial”. More by reason of it principally produced “governors”. These were curious devices rendered necessary by the inveterate quarrelsomeness of the stockholders. The shop was divided into three major departments called tradition than competency, the Legislative crew was supposed to design and manufacture the governors. However, it was generally known that the Judicial night-shifts did most of the work, and though they blandly denied it, nobody complained. There were all sorts of governors but the common principle of design was like that of an ingenious double handcuff. One side was labeled Rights and the other side Duties. When the stockholders could not settle their disputes amicably one could apply to the Judicial department for a Fitting of the Handcuffs, as it was vulgarly called. His contention was that the Right side of the handcuff fitted him and the Duty side his opponent. When the fitting was held, a red needle flashed round the dial, there was a tiny explosion and the locks clicked on the Duty side holding one or the other. For all its seeming simplicity, it was very complicated. There were many complaints. In the first place, it was rumored that the Government shop was not confining itself to the manufacture of the old, established lines of governors, but had branched off into making,
progressively, crutches, wheelchairs and little blue velocipedes. Secondly, the department was badly organized. The Legislative crew turned out an unconscionable number and variety of governors. The Judicial crew destroyed a few of them, but for the most part they were packed away in the labyrinthine recesses of the shop. Furthermore, nobody could apply for a fitting without a proper representative, who spoke a strange technical language known only to himself and the Judicial officers. Then, there was interminable expense and delay. The Judicial officers could never hold the fitting even of their own design of governors without examining the whole collection.

The chief difficulty, however, lay not in determining the selection of the proper type of governor, but in the ceremonies attendant upon the fitting. It mattered not that the Duty side of the governor obviously would fit only one of the contestants. If it had not been clamped upon him in accordance with the proper formalities, he could secure his release and a new fitting was ordered. When the proper ceremonies had been held on the second, third or even fourth contest, each participant received a little white card upon which was engraved the word "Justice". It hardly seemed worth the trouble. But that was not the end of it. If the handcuffed stockholder would surrender all his property to the Executive department he could secure a key to the locks and go about his usual occupation. There were numerous ways to avoid this harsh penalty. For example, the Legislative department manufactured a new device called Type 77-X, with which certain classes of stockholders could, by keeping their fingers crossed, retain their property by consenting to wear the handcuffs on the left wrist only.

There were still other complaints from the stockholders. It was said that the ceremonies had lost their ancient significance and had become merely a form of amusement—a game played by the Judicial department and its representatives at the expense of the stockholders. The participants in the game were loath to change its rules partly because they had always been the rules and were therefore entitled to veneration; partly because the representatives had no other occupation; partly because they could not agree that changes were desirable, nor what changes ought to be made. Besides, what could be better than getting paid for playing a game you loved to play?

Little was done about it until the stockholders began to settle their disputes in some other manner. They required the Legisla-
tive department to create a new shop called "Administration" where the Fitting of the Handcuffs was done with more dispatch, albeit sometimes capriciously and inaccurately. The stockholders created little shops of their own called "Arbitration". It even occurred to some that amicable settlement, however unsatisfactory, was preferable to watching the game played at their expense.

The resulting loss of custom was a hard crust for the Judicial department and its representatives to swallow. They held meetings at which there was a great deal of talk. Time and effort were given to promulgating changes in the rules: literally volumes of material poured out. Most of it was embalmed in libraries, gathered dust and was promptly forgotten.

The end of the fable was never written, nor its moral pointed. The author was declared to be mentally incompetent and was led away babbling "Nisi Prius" and "Certiorari".

II

The law ought to be a useful instrument of society to achieve ends believed to be desirable. That it has not been and is not now as useful as it is possible to imagine it, is traceable to forces both within and without the law. Except for philosophical purposes, it is probably sufficient to define the law as that body of rules applied by courts and enforced by executive action. Much unnecessary antagonism is created by confusing what the law is with what it ought to be. The chief business of the modern lawyer and judge is to discover and apply the rules set forth in the precedents, leaving to the legislative bodies the duty of changing them if and when it seems to be desirable. Of course, the common-law, like Topsy, grew in a haphazard way, as a recognition and declaration by the courts of what the articulate part of society believed the rules ought to be. Quite naturally, then, the courts follow and reflect social changes, rather than initiate them. In periods of extreme social and economic stress, the courts are unable to follow and change their rules to meet the needs of the moment, thereby bringing about their heads denunciations because the critics have confused the functions of the court with what they wish were its functions.

Like the artisans in the shop, we may ask how we can build useful machines without blueprints. If the law is to be an effective tool in the hands of society, then society must first decide what it wants to produce with that tool. In short, the preliminary to any
really adequate reform in substantive law is to determine what kind of a society we wish to have and then to set about achieving it as nearly as may be. Even the first step is impossible to take. We cannot lay down the theoretical conditions of an ideal society. There are as many Utopias as there are Sir Thomas Mores. Vague statements such as the "greatest good for the greatest number" or, in the modern phrase "the more abundant life" have no meaning. Society might be improved if the number were reduced, eliminating with Spartan impartiality the physically, mentally and spiritually unfit. Opposed to this are humanitarian considerations, including the vociferous personal objections of those who are to be eliminated. All of which recalls the mice and the cat: it was a fool-proof scheme until some cynical mouse asked who was to tie the bell on the cat. Again, what are goods—what makes life abundant? We have, on the one hand, the materialistic conception of Utopia, where everyone is happy, (not if, but because) he is well fed, clothed and housed. The idea grows and he must have, progressively, automobiles, movies, radios, electric refrigerators, ad infinitum. On the other hand there are those who believe that such a society tends to produce a dead level of mediocrity quite incompatible with what properly could be called a civilization. This group believes in learning for its own sake, in “time to stand and stare”, in a word, the gentle art of living. Perhaps such opposing viewpoints are not mutually exclusive. In any event, the conflict of aims and interests is there, necessitating compromises. There are conflicts between individual interests and group interests, raising such familiar problems as labor versus capital, monopoly versus individual proprietorship. The nature and extent of the surrender of interests of any group to any opposing group will ultimately depend upon a determination of which interests seem to have the higher social value. The first task of society is to provide the bare essentials of existence. We have to decide whether this can be better done through the institution of private property or through common ownership of the sources of wealth and the major instruments of production and distribution. We must then decide subsidiary problems such as the concentration of wealth and the possibility and desirability of redistributing it. There is a great deal of current nonsense concerning this matter. It is yet to be proved that modern wealth can be redistributed without destroying it, and that any redistribution would take a permanent form. The economic aspects of these problems are bound up with the humani-
tarian aspects: care of the poor, the indigent, the incompetent. In desperation, we propose panaceas: public works, compulsory employment insurance, old age pensions. We debate hotly whether these paternalistic measures will have a retrogressive effect destroying initiative, independence and self-reliance—qualities hitherto supposed to enhance the dignity of the human race. On the other side it is said that to exist is better than to starve stoically. Rumor has it that anciently it was not so.

We should beware of the dangers of a priori conclusions as to what is socially desirable. Aside from the fact that objectives change from generation to generation, or that emphasis is now here, now there, the desires of a people may be and frequently are for something quite different from what do-gooders, professional and amateur, think they ought to be. With the best will in the world it remains impossible to convince the average man that he ought to prefer Anatole France to (let us say) S. S. Van Dyne. From his own viewpoint, he may be quite right. There is a vast amount of intolerance parading under the name of uplift, wearing a clever mask with a disdainful nose under a pure brow.

It is not, then, strange that out of this welter of conflicting ideas, claims, wants and desires, there have come efforts to produce a better order than that resulting from the operation of "natural" laws. One such effort we have called Government—a tool of society. It is not an effective tool because we do not agree what we wish to do with it. There are changing conceptions of its nature, functions and limitations. At one time it is conceived of primarily as a restraining device; the less restraint upon individual freedom of action the better. At another time, we forget that it is really only an instrument and come to think of it as an end in itself. The machine in enlarged, curious new wheels are added and other wheels within them. It acquires a life force of its own and like some cancerous Frankenstein develops uncontrollably and at random.

This vast machine is operated by individuals presumably qualified, who conduct their operations according to certain rules, principles or standards, called law. The quality of the function is restrictive; negative rather than positive. The application of the function is to the individual. Adjective law is that body of rules stating the conditions under which executive sanctions will be used to enforce what the substantive law has defined. The idea
The comment on justice is a compound of belief in the validity of the substantive rules plus impartiality, certainty, speed and economy in their enforcement.

The greatest complaints of society against the law today are not with reference to the content of the substantive rules. They can be changed, they are being changed by constitutional amendment, legislative enactment, and court decisions. There is much wasted effort. Ill-considered legislative tinkering with social and economic problems constitutes an enormous burden. Certain evils are inherent in our judicial system. The inflexibility of general rules results in "hard cases". The very cumbersomeness and volume of precedents call forth efforts to condense and restate. The results are largely abortive. The Restatements promulgated by the American Law Institute, meritorious in quality and idealistic in conception as they are, remain simply glorified textbooks—unique and excellent—but still textbooks. They are valueless as authority until annotated to the respective reports. If the Restatement agrees with a reported precedent, well and good: the court is pleased to know that others also have wisdom. If the precedent is opposed to the Restatement, the precedent controls unless it is plainly wrong, in which case it probably would have been overruled notwithstanding. If there is no precedent—the exceptional case—a useful purpose is served.

More conspicuous has been the success of the National Conference of Commissioners on Uniform State Laws, especially in the commercial fields of substantive law. At least two criticisms of this method of reform are apparent: (1) lack of uniformity of interpretation; (2) uncertainty and delay in adoption by legislatures.

The social and economic evils traceable to defects in the content of the substantive rules and to the inherent cumbersomeness of the judicial technique, pale into insignificance in the face of those evils flowing from the defective application of those rules—the adjective law. The complaint is not that rights and duties, powers and privileges have not been correctly defined, but that they are not applied impartially, promptly and inexpensively. To begin with, there is no proper means of measuring the justice of the public's complaint. There is no statistical machinery in operation for determining just how the law works in action. The statistical method is available and a small beginning has been made. The great majority of litigated cases do not reach the appellate courts.
Therefore, such analyses as have been made from time to time by
the method of examining reported cases have only an argumenta-
tive validity. The primary step is, then, to get the facts. To this
end there is needed a large amount of money, competent directors,
investigators and analysts brought together into a permanent organ-
ization, supported by salaries and stability of tenure sufficient to at-
tract and hold the ablest members of the legal profession. These facts
when found, should be coordinated to give a complete picture of
the national scene of the law in action. Then, and only then, can
we determine the truth of the public's charge. The patient may
be a confirmed hypochondriac but in the process of ascertaining his
true condition we shall also diagnose his case. We can then proceed
to administer such medicaments or to perform such surgery as will
restore him to health and prevent a recurrence of the malady.

The good diagnostician may not be a competent surgeon. The
next step in the process is the creation of a permanent body of
experts—lawyers, judges, teachers—likewise supported by guarantees
of salary and tenure, to invent or improve such mechanical devices
as may be calculated to remedy the evils revealed by the reports of
the investigators. The first task of these experts would be a critical
analysis of those devices which have been employed or proposed in
the past. Nowhere has this been done. The material is scattered
through hundreds of pamphlets, bar association reports, magazines
and law reviews. There should be a comparative study of the de-
vices employed in England and on the Continent. Thus far, at-
ttempts at improvement have (presumably) been a matter of in-
dividual state action. We need mention only such devices as code
pleading, rules of court, summary judgments, judicial councils,
and the various schemes for fact-finding such as references to
masters, trial by the court in lieu of a jury, and special interroga-
tories in lieu of the general verdict. Study is needed of the effec-
tiveness of these devices in actual operation. Experience in one
state can be profitied by in another. A procedural device suitable
in New York may be utterly unworkable in West Virginia for no
other reason than that the traditions of the bar are against it. If
evils are found for which no procedural remedies have yet been
devised, then this body of experts should undertake to invent them.

The third step in the program is the transmission of the find-
ings and recommendations of these two bodies to such state agencies
as will undertake to convert them into realities—bar associations
and judicial councils. There, the proposals should be intensively
studied in relation to the temper, habits and traditions of the bar. If, after full investigation, the proposals seem suitable, the next step is to put them into action through the medium of the judicial council or by legislative enactment. The latter body is always lethargic and sometimes actively hostile to any proposal advocated by a bar association. The association, on the other hand, suffers from lack of funds and the effective placing of responsibility for the success or failure of its legislative program. What is everybody's business soon becomes nobody's business.

If then, the legislature should fail to respond, two alternatives are open: lobbying and the creation of an awakened and forceful public opinion. The public must, as we say, be "educated" quite as much to desire improvement in the administration of justice as to desire tooth-paste, air-conditioning or instalment buying. The usual channels are available: forums, civic organizations, newspapers, radios, and so on. Again, for either purpose, money, time and competent participants are indispensable.

Any proper program of the sort outlined, on a national scale reaching into every state, must necessarily be vast in scope, expensive and prolonged. Where are the funds to be secured, the personnel to be found? Assuredly we cannot hope for much by way of governmental appropriation, state or national. Even if this source could be tapped, it would have an inevitable political and partisan coloring. Few honest and competent lawyers could be persuaded to subject their futures to the vicissitudes of the ballot-box. The only satisfactory solution seems to lie in private assistance from the great foundations. Small beginnings have been made in this direction, but nothing approaching the enormous contributions made to the science of medicine. No adequate explanation of this anomaly has been made. It may be traceable to limitations and conditions imposed by the creator of the foundation. If so, this would indicate a lamentable lack of imagination—the sort of man who can believe in the reality of an accomplishment only if he has physical evidence of its existence. The rehabilitation of the unfortunate has a warm, human appeal, but the renovation of the legal system seems as cold and distant as the light from the Great Bear.

Given the funds, organization and objectives previously stated, the problem is far from solved. We have spoken only of mechanical devices for the improvement of the administration of justice. We
cannot forget that the machine is operated by lawyers and judges. Any adequate program of reform, whether in substantive or in adjective law, must go to this, the root of many of the evils actually or supposedly existing. To begin chronologically, what of the prospective lawyer and judge—the law student? Democratic conceptions of the "natural" right of every man to follow whatever occupation he may choose and to rise as high as his intelligence and capabilities permit, create the first obstacle. This is the inevitable result of our shrewd native capacity for calling a spade a spade: the practice of law is primarily a business and not a profession. Protestations in canons of ethics and reiteration by bar associations to the contrary do not change the facts, least of all in the public mind. Some controlling devices are available. The standards of pre-legal education have been raised. Even so, there are more applicants than are necessary or desirable. Much remains to be done in determining moral qualifications, natural aptitude, social backgrounds and financial limitations, lack of any of which may make the applicant undesirable. The tests are inexact, the whole subject is controversial and lends itself readily to demagoguery.

Assuming that we can select proper subjects for exposure to legal education, a host of problems are unsolved. What is the object of legal education, what is the proper "approach" to the law, what are the best materials and instructional methods—in a word, what sort of lawyers, duly stamped and certified, are we to inflict upon the public? Progress is being made through the Association of American Law Schools, through the cooperation of bar associations with particular schools, but there is no common philosophy. There is the inevitable tendency of the lawyer and the professor to regard each other with suspicion. One cries "theorist" and the other cries "money-grubber". Faculties tend to withdraw into a small world of their own creating and go on teaching much the same courses in the same way with such changes in detail as are necessitated by recent decisions and statutes. They cannot know whether this is producing a good lawyer or a bad one except by constant liaison with the active bar. Even then, there is disagreement as to what constitutes goodness or badness.

A re-examination of the qualifications of the prospective lawyer should be made upon application for admission. Time, money and conscientious effort are, as always, indispensable. Here again is the opportunity to check evils at their source. It might be desir-
able to admit the applicant provisionally for a trial period—a sort of companionate marriage to the profession of his choice. If unconditionally admitted, then he acquires a vested right, of which he cannot be deprived except by disbarment or suspension. These time-honored devices for locking the barn door leave much to be desired. Meanwhile, the public suffers and the profession is blamed as well it may be. Too much emphasis cannot be placed upon the importance of tradition as a self-controlling influence. Without it, canons of ethics are about as useful as the Ten Commandments in their actual effect upon human conduct, and less often heard. It may be that the canons themselves need re-examination in the light of modern conditions. We note the changing nature of the relation between attorney and client, the growth of the legal "factory" employing fifty to a hundred lawyers, most of whom never see the client. There is the specialist set over against the general practitioner, who, like the country doctor is fast becoming a rara avis. There is the practice of law by lay agencies, by trust companies, title companies, and the like. Leading lawyers dip into the pot with the left hand while holding their noses with the right. No one knows to what extent the legal profession lives by bread alone; to what ends self-hypnosis and unconscious hypocrisy are leading it. Bar integration is simply another mechanical device for more effectively controlling the conduct of the lawyer. It can never be more than that until there is a moral regeneration of the individual, the self-abnegation of the real professional.

All that has been said before applies equally to judges because they are yesterday's lawyers in today's ermine. Although it may be chemically possible to metamorphose a sow's ear, the adage retains its validity. Much has been done to improve methods of selecting judges, but more remains to be done. What are the requisite personal qualifications? Experience, intelligence and technical knowledge go without saying. We can no longer ask whether he is liberal or conservative because we do not know what we mean by those terms. Yesterday's liberal is tomorrow's conservative, depending upon the election returns. Thus back of it all is the lack of a social philosophy. What sort of a civilization do we think we prefer?

It may not be too late. The aroused public interest occasioned by a proposal to pack the Supreme Court of the United States by the method of counting the noses of justices under seventy
years of age, may have another and beneficial effect. One major obstacle to procedural reform arises out of the fact that denunciation of the rules implies a denunciation of the court itself. Traditionally, the courts have been above criticism by the public *en masse*. The current questioning of judicial infallibility in the field of constitutional law may thus be an indication of public readiness to subject the courts to criticism in other respects. If this interest can be kept alive and broadened into an intelligent, well-directed and forceful demand for improvement in the administration of justice as a whole, we shall speedily begin a comprehensive and sustained program. The best legal minds must be attracted and held to give their whole energies to the work. The bar must search for the necessary funds and create permanent organizations. Such a project would seem to be more worthwhile than many of those to which millions are now being devoted.

The nucleus around which such an organization could be built is the American Judicature Society, which, more than any other body, is responsible for fostering and keeping alive these ideals and aims.

Unless then, we can improve the personnel and the mechanical devices, government by law will soon be discarded as a useful tool of society, and supplanted, as it has been elsewhere, by executive fiat. With it will go all that it implies: security, stability, and predictability of interests of person and property, without which life is a burden not to be supported.