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# THE SUPREME COURT, THE ADVERSARY SYSTEM AND SOME MORAL DILEMMAS

PETER J. RIGA\*

Whatever else one may say about the administration of justice in this country, one may say with some certainty that there exists a general *malaise* concerning this matter among the general population. Even lawyers experience a basic moral dilemma, since the object of the present adversary system is "to win," not to seek truth or justice. As a result, a certain cynicism develops among law students, which manifests itself completely almost before they graduate from our law schools. The adversary system in this country is predicated on the assumption that there are always two sides to any question, that "truth" is always a matter of degree based on the particular facts of each case, and that the best way to arrive at justice is to allow attorneys to engage in a form of attenuated warfare within the parameters of certain rules of evidence. This looks good on paper until one examines the results and fruits of the system itself.

Much of the justice one receives at the hands of the courts is dependent upon factors extraneous to truth finding in a public forum such as the quality and experience of counsel, the amount of money one can afford to pay for an attorney and paralegal investigations, as well as the political persuasion of juries and the process of jury selection. In 1976, for instance, the eleven major American airlines spent \$2,800,000 for outside counsel to represent their interests in regulatory proceedings before the Civil Aeronautics Board. That same year, public interest organizations spent a total of \$20,000 for representation at those proceedings.

Often the attorney himself is faced with a moral dilemma as he carries on his profession. He may know the basic injustice of his cause, or that there are certain witnesses telling the truth whom he must "destroy" on the witness stand, or that his client is guilty of the crime charged. In the latter instance the lawyer is aware that if he successfully defends the guilty party, he will be at least partially responsible for releasing a dangerous person possibly to wreak havoc on innocent people.

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The standard justifications for this state of affairs have been articulated many times: we have an adversary system under which a plaintiff or the government must be put to its proof, particularly in criminal cases; the lawyer is not the judge and jury of the guilt or innocence of his client; the alternative to the adversary system is the inquisitorial system which history has shown to be basically inhuman and unjust. Despite these truisms there exists a basic moral dilemma which no amount of justification can attenuate. Perhaps it lies in the very nature of our search, for truth is always incomplete. Perhaps it is due to the way we train and pay lawyers, since we desensitize them to all these problems by emphasizing the all or nothing concept of "winning" or "losing" so characteristic of the adversary system. Finally, perhaps it is related to the whole concept of a legal system which always seeks to preserve the *status quo* by emphasizing the notion of "under law." The fact of the matter is that, for the most part, lawyers are a commodity to be bought and sold by those who can afford their fees, and, of course, those who best can afford their fees are the rich and powerful, in whose interest it is to preserve the status quo by adhering to the "laws" which already have been made. It is futile to look for a remedy among those very people who have everything to gain by keeping things more or less the way they are. Thus, we have developed the concept of the lawyer as the "hired gun" who wins, not because of the justice of his cause, but by virtue of the skill and quickness of his trigger finger. It is no wonder that Shakespeare said that if you want a revolution, the first thing you must do is to kill all of the lawyers.

But what is to replace our judicial system? Would we want the justice of a peoples' court organized at a local level as is done in Communist China today? That system has some serious drawbacks associated with it, not the least of which is its total politicalization and the concomitant death of freedom of expression and human dignity. While, in China, such an institution may represent a step forward from the avaricious Mandarins, it would be a giant step backward for our legal and political institutions which respect the value and dignity of the individual person vis-a-vis the government and other persons. Is there a medium position possible between these two extremes? I do not know, but at least the question merits some serious thinking on the part of informed citizens and lawyers alike; the matter of the administration of justice is much too important to be left solely to lawyers and judges.

The presumptions made herein are that the present adversary system is causing *malaise* among the general population and also has become an agony to decent lawyers everywhere. We must expose some of the basic mythologies which lawyers and informed people ought seriously to consider. For example, we are all acquainted with our history in which minorities—Indians, Blacks, Mormons, Japanese, and, more recently, war resisters—ultimately have been failed in some way by the United States Supreme Court. Equal justice under law is as yet a promise for them to be fulfilled in the future, but their vindication will not and cannot be forth-

coming from the courts. Perhaps, as we shall see, this failure of the court is not altogether a bad thing. The Court cannot serve as a substitute for the moral sense of a people who must find solutions to their own problems and avoid the short-circuit of judicial imperialism. The major problems of a people are never judicial in nature; they are legal in nature only because they are first moral in nature; but there can be no legal or judicial remedy for a moral malady.

This is a difficult lesson for our young people to learn. Many of them enter our law schools with the notion that they are going to change the social system by means of the courts. Historically, this short-circuit of social change has never been effective and there is no indication from the present Court that this situation will be altered. In fact, there is every indication that the unpleasant record of history will repeat itself. Often, when the Republic has come to grips with the problem of her minorities, it was the minorities who lost, due in only a small degree to the moral dereliction of the Supreme Court. At most, the courts can only provide relief to a few fortunate individuals. The basic question of the relationship among dissenters, the majority, and the various minorities remains a problem of and for the people themselves to solve, and no Court decision, no matter how courageous and forthright, can serve as a substitute. Much of our perception of courts and judges as leaders is a myth of the most dangerous sort; what we really are looking for is an escape from personal responsibility for our own destiny. To expect courts to do this for us, individually as well as collectively, is to engage in the most deceptive escape from freedom and responsibility. Judges and courts never have been and never can be true leaders of the community. Their competence is in law, not justice.

If one were a Marxist, it would be tempting to analyze the American historical situation from an economic and class viewpoint. Before 1936, any truly social legislation—what little there was—was almost universally struck down as unconstitutional, while workers starved, children were abused, women were overworked and separated from their families, and strikers were murdered in their beds and on the picket lines. The Supreme Court offered no relief from this situation; in fact, for the 100 years preceding 1936, the Court was considered such an enemy of labor and the working man that few bothered to appeal cases to it. There are few capitalist manifestos which could equal the decision in *Lochner v. New York*<sup>1</sup> and its freedom of contract, freedom to starve doctrine. If a large industrialist could not obtain the militia or the army to break his strikes, as was common in the 1900's, he could achieve the same result in the first part of the twentieth century by having a federal court enjoin the strike. The federal courts effectively destroyed organized labor for some 60 years by the simple legal technique of enjoining any and all strikes, a technique Felix Frank-

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<sup>1</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

furter labeled "government by injunction." The method was disarmingly simple: if a strike were delayed, economic necessity prevented workers from continuing, so the strike simply ended and the *status quo ante* prevailed. One certainly could argue that the violence of the Molly Maguires, the Railroad Strike of 1877, the Pullman Strike of 1894, Ludlow, and the Memorial Day Republic Steel Strike of 1937, in which thousands of workers were killed and maimed by army regulars and civil police, were all the indirect result of the issuance of orders and injunctions by the federal courts which left workers with the alternative of either starving or breaking the "law." Courts, including the Supreme Court, only exacerbated the problem by imposing a *laissez faire* economic and social policy under the guise of interpreting the Constitution. It was the people and their representatives who ultimately had to solve this problem by appropriate legislation which was almost destroyed by the Court between the years 1935-1937.

It also seems that historically, whenever the Supreme Court has been faced with the problems of American minorities, with very few exceptions its decisions have failed to benefit those minorities. Beginning with the Indians during the early part of the eighteenth century<sup>2</sup> and ending as late as January 1977,<sup>3</sup> the pattern for the most part has been the same: minorities are second-class citizens living in a schizophrenic nation which does, in the words of St. Paul, the evil it does not wish and wishes the good it does not do. It is of little assistance, however, to heap abuse on the Court; we simply must recognize the limits of this governmental institution and realize that we have placed our trust in a false god incapable of bringing about what we all so ardently and naively thought could be achieved by its "rational" opinions and decisions.

But, what ails us does not involve rationality at all; it involves faith and belief, or rather, a faltering of our faith and belief as a nation in democracy. We cannot blame institutions for our own lack of courage and vision. It is only after we have left behind forever the false worship of and hope in the Supreme Court and the judiciary in general that we can begin collectively and individually to solve our problems.

This problem is not without its own irony. In an attempt to prevent democratic responsibility for the legal and moral dimensions of our difficulties the Court has usurped the power of decision from the people and from the legislature, the representatives of the people. In the words of the eminent constitutional lawyer, Philip Kurland, the Court has usurped "general governmental powers on the pretext that its authority derives from the fourteenth amendment." Government by the judiciary has now become a commonly accepted practice of our form of government. As an example, the reapportionment decisions of the 1960's show how the Court simply skirted the intention of the framers of the Constitution and applied

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<sup>2</sup> Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

<sup>3</sup> Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977).

its own idea of what constitutes a liberal democracy. The unimpeachable evidence shows that the framers entirely excluded suffrage from the scope of the Constitution and left that decision in the hands of the respective states. The Court, then, simply read the political slogan "one man, one vote" into the Equal Protection Clause of the fourteenth amendment, entirely neglecting the second clause of the same amendment, and thus arrived at a formula which it found philosophically acceptable. The Constitution had been bypassed and the will of the people and the legislature effectively nullified by this superimposed and revisionist reading of one clause of the Constitution. Common sense demands that the historical background and literary context of a document be examined in order to correctly read its text. It is apparent, historically and literally, that the framers of the fourteenth amendment excluded suffrage from *all* federal control. Thus, "one man, one vote" flatly contradicts the intention of the framers of the amendment. This incident exemplifies how the "due process" clause has been bent and perverted to fit all forms of juridical revision and substituted government. Aside from the merits of this particular result, it is most emphatically not the province of the Court to make such decisions.

Moreover, much of this juridical intervention is affirmatively harmful. If there is one area where the views of the people should be respected, it is in the domain of family life. Yet, juridical imperialism has had its most disastrous effect to date in this sphere. In only 5 years, the decisions of the Supreme Court on matters of family morality have created a revolution, all stemming from a simplistic reading of the equal protection and due process clauses of the fourteenth amendment. Starting with the abortion decision in 1973<sup>4</sup> through the recognition of the right of a woman to have an abortion without her husband's consent<sup>5</sup> to the striking down of all legislation concerning contraceptives for minors,<sup>6</sup> the Supreme Court has effectively destroyed much of the underpinnings of American family life and authority. Whether this should have been done is irrelevant. The fact is that this social morality was imposed on a people who had no input into the decision by a Court responsible to no one except itself. Moreover, the notion of social responsibility has reached such a low ebb that even attempts to override the Court and return the right to make these basic decisions to the people and the legislatures are viewed with great alarm by large portions of the population. If a society is to live by such social morality, at least it should be the people and not the elites of the judiciary and very special interest groups who decide this basic question.

Indirectly, this is also responsible for the proliferation of law suits in this country concerning every conceivable problem and *malaise*, ranging from the exclusion of girls on Little League teams to the hiring or firing of

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<sup>4</sup> Roe v. Wade, 410 U.S. 113 (1973).

<sup>5</sup> Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

<sup>6</sup> Carey v. Population Serv. Int'l, 97 S. Ct. 2010 (1977).

sex-changed teachers. People have been bamboozled into "believing" that courts will "solve" their problems, attributing to the judiciary a wisdom which it does not and cannot possess. The courts have, in turn, obliged the people in relieving them of responsibility for their own lives by substituting juridical government. The very narrow province of judicial discretion has been enlarged much beyond its proper bounds, resulting in the constitutional function of "the Court" being expanded to encompass the ordering of massive busing, political relocations, radical adoption innovations and changes, as well as complete changes in the nation's sexual morality, dislocation of family life, and employment practices of the most minute dimensions.

A proliferation of lawsuits is always a sign of the degeneration of relationships in any given society. It indicates that people can no longer solve their own problems; they therefore appeal to an impersonal court system which the parties consider "fair" and "impartial." This belief is a myth, as any study of the political appointees to the bench readily shows. We all have political, social, and economic biases which the donning of black robes will not alter. Even with the best of intentions, the juridical decision-making process often involves justifying opinions already formed, and distinguishing precedents to fit the present case within a "homogeneous development." The social and political biases of the Supreme Court of the 1930's was one of economic liberalism; those of the present Court have begun to cause a swing backward. In other words, it is pure mythology to think that any two parties can get "impartial" justice in courts of law; courts act within a political context and with social and economic bias. This does not necessarily impugn their sincerity, but parties to a lawsuit ought to recognize the myth before they commence a legal battle in the "impartial arena." Honesty demands that lawyers explain this elementary philosophy to their clients and urge them to attempt to reach a settlement by the give and take of negotiation. One would expect this to be part of the "full disclosure" between attorney and client.

The adversary system itself is quite depersonalized and inhuman; if people utilize it, they ought to recognize that fact. In court, only the barest facts germane to the narrow issue of the case are admissible; the complexities of human relationships simply are not taken into consideration. In fact, they cannot be. Justice is a complex amalgam of facts, relationships, nuances, vulnerabilities, and truth—and courts have neither the time nor the ability to analyze all of these factors in the search for justice. For this reason, it is far better for parties to attempt to solve their problems humanly, with the give and take natural to any human relationship. Arbitration and conciliation should be the standard tools and normal means of settlement in any humane judicial system in a civil context, and trial should be regarded as a human failure. But law schools teach few, if any, of these procedures. In the three years of my law school training, such courses were never even offered.

Moreover, the adversary system results in inhuman decisions; in the

vast majority of cases one party completely wins, and the other completely loses. This may lead to a practical solution for a particular problem, as courts have enforcement power at their disposal, but it does not and cannot solve the human problem. Life is much more complex than a win-all/lose-all dichotomy. The losing party, far from feeling that justice has been done, is left with nothing except great expense and a sense of outrage at a system which has labeled his case as "without merit." This is patent nonsense, since his case has some merit and justice demands that it be satisfied *pro tanto*. That would be the humane manner in which to solve a problem, but courts and lawyers do not operate in that way at all.

It may be argued that, in addition to depersonalizing the persons involved and rendering inhuman solutions to the cases brought before the courts the adversary system itself, at least in civil cases, is directly responsible for the increase in dissatisfaction with the administration of justice. In theory, a court battle serves as a substitute for active violence between citizens who formerly resolved their disputes by resorting to duels, guns or swords (*vendetta*). The trial is seen, therefore, as a nonviolent battle leading to peaceful solutions to internal conflicts among citizens. This is an illusion which often leads to even greater dissatisfaction than that resulting from the vendetta or the fast gun of the wild west. At least the latter method solved problems, since dead people are not dissatisfied. Courts today give us psychological violence and an injury to justice which is greater than in the past. The totally vanquished are left with a sense of outrage and manifest *injustice*, since there is usually *some* element of justice in any particular case. This sense of outrage is not assuaged by having had an opportunity to be heard before an "impartial" tribunal. Rather, since every plaintiff and defendant knows there was at least some merit to his case, there develops a creeping distrust and cynicism toward the whole system of justice in this country. The low esteem in which lawyers, judges, and the system of "justice" are held in this country is justified. This situation can only deteriorate unless some radical changes are effected in the adversary system. It is beyond the scope of this Article to make any recommendations in this respect, but careful consideration of this area by lawyers, judges, and citizens, who, after all, are most affected by the system, is long overdue. More effort must be focused upon the development of more humane forms of conflict resolution such as arbitration and conciliation, religious and neighborhood courts, as well as the long forgotten but valuable participatory tool of jury nullification.

We must, therefore, correctly apprehend the limited nature of the judiciary's role. It will assist citizens, and benefit the republic, if they are disabused of the various mythologies which have already been mentioned and encouraged to utilize arbitration more readily so that solutions can more closely conform to human justice rather than to legal principles, which oftentimes have little relationship to justice. The primary concern of the courts is peace keeping. If justice ensues, so much the better, but this is not imperative. That is why American courts are called courts of

law and not courts of justice. Apparently, only one major American decision has referred to courts as courts of justice<sup>7</sup> and that decision was rendered almost two centuries ago!

It is also important to understand the limits of the court system so that our expectations will not be too high. This naturally raises the question of political power in society. Ultimately, in a democracy, it is the people who must solve their own problems so as to determine their own destiny. Any attempt to short-circuit this procedure on fundamental issues through use of the judicial process will ultimately fail, because courts have neither the experience nor the breadth of vision to solve these problems for a society. Resort to the judicial system in such instances is, in effect, a refusal to accept responsibility and manifests a lack of confidence in fundamental democratic beliefs. Moreover, it gives rise to the wrong kind of expectations about law and courts. Law as the regulator of private relations and private rights is subject to the above mentioned limitations, and depends, in a certain sense, upon some system of adjudication. But law as a system allocating public powers or establishing the basic consensus of a society presupposes a basic moral sense in the people and is by no means the creature of courts or judges. No law or court can establish such a consensus by fiat; on the contrary, these institutions are utterly dependent on the moral sense of a people. In this respect, law betrays its origins in politics; that is the basic reason why a people come together and form any given society which law and courts must respect and never alter under the guise of juridical interpretation. This problem is present in any system of power, even one of "checks and balances" such as that of the United States. The power which courts possess stems from the respect afforded their decisions and orders which exists only to the extent that the decisions are legitimate, that is, only as long as, in the people's view, the courts have not superseded the narrow bounds ordained for them in the basic consensus of the society.

This explains the historical and moral failure of the Supreme Court in dealing with the basic problems of America's minorities in a pluralistic society, a society which does not share common values concerning the nature and destiny of man. The society itself, usually by conflict and confrontation, must arrive at a consensus concerning the rights of all people within its jurisdiction. Ultimately, no court can solve these problems, and when a court attempts to address the issue, it must fail. This lesson was learned, for instance, by the civil rights advocates who had hoped to achieve many advances through the judicial process. It is becoming clear that the Supreme Court can go no further than the consensus of the people; when it forges too far ahead,<sup>8</sup> it must shamefully attempt a narrow but definite retreat in later years.<sup>9</sup> For now, however, it is sufficient to observe

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<sup>7</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>8</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>9</sup> See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 97 S. Ct. 555 (1977); *Milliken v. Bradley*, 418 U.S. 717 (1974).

that civil rights groups must once again begin to build, by a long and painful process, the political groundwork without which no Court decision is worth the paper on which it is written.

It should be noted that this discussion is applicable to only the civil adversary system. The criminal adversary process, wherein the government must prove its case beyond a reasonable doubt, ought to remain as it is. The reason for this fundamental distinction is quite simple: the criminal system appears to possess many undesirable features until the alternatives are examined. Historically, the criminal system has served as a bulwark in the defense of human dignity against the "truth" seeking inquisitions of past regimes. Government traditionally has been unconcerned with the ends-means distinction and has focused instead upon ensuring civil peace and order and maintaining its own power. Thus, the civil liberties and rights of the individual were of little importance. By restraining the government's actions in this respect, the courts have protected citizens from the temptations inherent in government, namely, despotism and disregard for the rights of citizens in order to attain the legitimate governmental interests of ensuring peace and order. A government is never more democratic than when it passes self-denying ordinances such as the first ten amendments to the Constitution; and government is never more restrained than when it is put to its proof where it seeks to deprive one of its citizens of his life or liberty.

#### CONCLUSION

The intent of this Article is not to demean the function and role of the American judiciary in general or the Supreme Court in particular; rather, its purpose is to point out the inherent limits and shortcomings of the judiciary as a system. The role of the judiciary in modern times has been extended beyond anything which the framers of the Constitution ever intended. One contingency which the framers feared is rapidly coming to pass: government by juridical edict in practically every area of life which impinges upon the fundamental province of the people and their representatives. For the benefit of the people, the court system must be demythologized in order to avoid the bitter disappointment resulting from expectations being dashed by undelivered and undeliverable promises. It is not within the province of the courts to deliver answers to the basic political questions of our society, and it is cruel to lead people to believe that the judiciary can solve these political dilemmas. Moreover, any such solution is indicative of the people's abdication of responsibility for their own destiny. Aristotle once said that a thing can be understood only by looking to its historical origins. The truth of this precept is confirmed by the past 150 years of Supreme Court decisions regarding America's minorities. It also is demonstrated in a negative fashion by the judicial imperialism evident in this society. The people cannot escape from political responsibility by a short term juridical "fix." It is sheer sophism to believe that an unelected

judiciary has the wisdom or the ability to give us a solution to our political problems.

Our system of government is tripartite, and its principal organ is the legislative and not the judicial branch. The Congress closely represents the will of the people in legislative enactment. Courts can countermand only the most serious of legislative abuses; they cannot and must not attempt to reform society. Minorities must increase their input if their freedoms are to be vigilantly protected. To depend on the judiciary for such protection is to grasp at an historical illusion which will fail when pushed beyond the powers of its origins. In the final analysis, it is courageous participation in the political process that is the best guarantee of freedom in a democracy. The judicial process is at most an *ad hoc* mechanism and a catalyst for action by the people. The short-circuit route of using the judiciary to solve basic and fundamental social problems must fail, as the history of the Court clearly shows.

In 1973, the Court recognized abortion as a "fundamental" right in *Roe v. Wade*.<sup>10</sup> This right was not considered so fundamental by 1977.<sup>11</sup> Due to the outcry of segments of American society, this right, which was purported to be the greatest victory in the history of the abortion controversy, became a right which is private, both conscientiously and economically. In reality, the abortion debate, like those controversies concerning civil rights, abolition of capital punishment, restraints on pornography, expanded rights for defendants in criminal trials, discrimination, sexism, and a host of other maladies in our society, was solved by litigation and not by legislation. The basic reason why the Supreme Court must continuously vacillate on all or most of these issues is quite simply the fact that the Court cannot express the will of the people. Without that moral commitment, all Court decisions which seriously affect the public welfare and morality are bound to be short lived. When basic goals of the commonwealth are pursued in courts rather than through the political process, bad law, disdain for courts, and the ultimate failure of court decrees result. What cannot be won in and by representative institutions will ultimately lead to bad law if enforced by the judiciary. This is the price we pay for living in a democracy—a terrible system until the alternatives are examined. As Abraham Lincoln, discussing the *Dred Scott*<sup>12</sup> decision, pointed out:

"[t]he candid citizen must confess that if the policy of the government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant that they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent, practically resigned their government, into the hands of that eminent tribunal."<sup>13</sup>

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<sup>10</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>11</sup> See *Maher v. Roe*, 97 S. Ct. 2376 (1977); *Beal v. Doe*, 97 S. Ct. 2366 (1977).

<sup>12</sup> *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

<sup>13</sup> 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (R. Basler ed. 1953).

Lawyers and judges are notoriously bad historians. Even a cursory study of the above mentioned cases should teach the judiciary that, for better or for worse, the ultimate responsibility for the destiny of the people lies with the people and their representatives and not with an unelected and unresponsive judiciary. This historical insight can readily instill a sense of humility so badly lacking in "the least dangerous branch."