

Individual Justice in a Bureaucratic World

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The theme of this conference, "Abuse of Procedural Rights," connotes the affirmative misuse of the apparatus of procedure. Procedural abuses include: assertion of frivolous claims, interposition of frivolous defenses, unjustified protraction of litigation, efforts to escape the preclusive effects of *res judicata*, and so on. The papers and the discussion elaborate in detail these and other abuses of the machinery of justice. I share concern over these abuses and join in the efforts to identify and remedy them. However, any diagnosis aimed at curing legal abuses should take into account the larger legal and social context and potential negative consequences of remedial efforts.

In considering this larger context, we should keep in mind the types of litigation in which "procedural abuse" arises. Many abuses occur in commercial disputes and other litigation between businesses. Other abuses occur in litigation between individuals, for example, in divorce litigation. However, we should be mindful that many forms of conduct considered to be abuse of procedure arise in efforts by individuals to obtain justice in disputes with bureaucracies. "Bureaucracies" include government agencies whose functions pervade the modern community: administration of public health care, pensions, transportation, employment relationships, and so on. They also include private bureaucracies: the levels of administration in business corporations responsible for handling customer complaints in disputes that cannot be resolved under the impetus of competitive pressure. Such claims concern employment discrimination, injury from harmful products, injury to the environment, employment and retirement benefits, and the like.

I can speak from specific knowledge only about the situation in the United States. However, discussions with colleagues familiar with other legal systems indicate that similar problems are encountered elsewhere. Thus, all countries with substantial government bureaucracies are susceptible to bureaucratic oppression of ordinary citizens. Widely expressed complaints concern arbitrary enforcement by police and regulatory officials such as building and safety inspectors, tax collection officials and other lower level

officials. Indeed, in some countries bureaucratic oppression takes the form not only of arbitrary determinations and rulings but extortion and solicitation of bribes. Similar problems arise in encounters between large business corporations and ordinary citizens. I believe that the leadership of most large business corporations sincerely endeavors to have a company's officials deal fairly and honestly with employees, customers and people residing in the vicinity of the company's factory, mill or other operating facility. However, the pressures and incentives at lower echelons often lead employees of business corporations in the opposite direction.

In this country, many of our most difficult legal problems arise in disputes between individual citizens and public and private bureaucracies. Many illustrations can be drawn from decisions of the Supreme Court of the United States, a tribunal that hears only a minute fraction of all the civil litigation in this country. One important decision by the Supreme Court dealt with the burden of proof in a claim of racial discrimination brought against private employers, such as a hospital or a manufacturing company.¹ Another important decision concerned the liability of a public agency responsible for children's welfare when a child under its authority was subjected to serious physical abuse by a vicious step-parent.² Another decision concerned the availability of a "good faith" defense to a public official accused of arbitrarily procuring the dismissal of a public employee.³ Review of the appellate court decisions in our state jurisdictions reveals similar controversies.

These cases are exceptional only in that they have survived litigation, often expensive and protracted, before ascending to the appellate courts. Many times this number of appellate cases are resolved in the trial courts—usually by a decision adverse to the individual. Moreover, this takes account only of civil cases. Every criminal prosecution can appropriately be considered, at least from one perspective, as a dispute between public bureaucracy and the individual accused of a crime.

These kinds of disputes evoke the image of David versus Goliath. Very often in such disputes the individual visualizes himself as a "David," asserting a claim for personal justice against an opponent with overwhelming financial and political resources. The other party to the dispute does not visualize itself as Goliath, however.

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1. See *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).
 2. See *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989).
 3. See *Gomez v. Toledo*, 446 U.S. 635 (1980).

Most officials of most bureaucracies consider that they are only trying to fulfill their responsibilities. When bureaucrats resist a claim in a dispute with an individual, their doing so is, in their eyes, simply a responsible rejection of an over-reaching claim.⁴ There is justification for this attitude in many cases, complete justification in some cases, because the unfortunate fact is that individuals sometimes believe they have been wronged by the bureaucracy when they have simply been dealt with according to the rules. Hence, in litigation by some of the Davids, it is Goliath, more specifically lower level employees of Goliath, who are suffering abuse of process. Partly for this reason, when a dispute between an individual and a bureaucracy reaches the litigation stage, both sides regard themselves as doubly aggrieved: aggrieved in the first instance by what is perceived as disregard of rights or obligations, and further aggrieved by intransigence in the failed effort to resolve the dispute short of litigation.

As I suggest later on, in my opinion, serious and systematic attention should be given to various means to ameliorate legal disputes between individuals and bureaucracies. However, careful analysis is required of the nature of various kinds of such disputes, their statistical frequency, and the way in which they develop and unfold, with awareness that the most serious difficulties may not concern those who most loudly complain. In all law reform it is important to be circumspect about the nature and magnitude of the problems to which reform is to be addressed.

Unfortunately, in this country we have witnessed several instances in which our legislative bodies have not been circumspect. One conspicuous example of misconceived procedural reform is now dying a welcome death. This was the Civil Justice Reform Act of 1990. In this legislation, Congress responded to what it believed were serious problems of procedural abuse in the federal courts. In particular, Congress thought that discovery was being abused and that courts were unconcerned and unimaginative in dealing with these and related abuses. Accordingly, Congress ordered that special "experimental" procedures be introduced in some of the federal trial courts. Among these experimental procedures were alternative dispute resolution, expedited discovery, and limitations on discovery. Ten different federal courts adopted various combinations of these procedures and administered them over a period of several years.

However, when the experiment was completed, the one conclusion which could be reached through evaluation was that it was

4. See Geoffrey Hazard, *Authority in the Dock*, 69 B.U. L. REV. 469 (1989).

impossible to tell which “experiments” had any significant effect.⁵ The immediate problem with the experiment was that it had not been established on scientific experimental principles. Specifically, no data had been collected concerning how the ten courts had functioned before introduction of the experiments, so that “before and after” comparison was impossible. Nor was systematic data collected comparing the patterns of caseload among the ten courts during the experimental period, even though it was obvious that there were substantial differences among the courts. For example, one of the ten was the Southern District of New York, a district notorious for the high incidence of complex litigation in its docket. Hence, coherent parallel comparison was also impossible. Finally, the courts participating in the experiment were selected simply because they had volunteered. It is a basic principle of social research that volunteer subjects are likely to be different in undetected ways from the general population.

Another risk in procedural reform is that reforms often proceed on the basis of anecdotal information—conspicuous cases which often are atypical. It is simplistic to construct stereotypes, perhaps as simplistic as the story of David and Goliath. American legislators seem particularly prone to such stereotyping and to undertake modification of the rules of procedure on the basis of stereotypes. Thus, despite the ineffectual experiment generated by the Civil Justice Reform Act, described above, Congress has proceeded with reforms uninformed even by poor experiments.

Within the last few years Congress has imposed special rules of procedure for two different types of litigation, one type concerning private bureaucracies, the other concerning the federal tax administration. The reform addressed to private bureaucracies concerns litigation under our Securities Act. Under the Securities Act, stockholders can bring suit against a corporation and corporate officers for losses in the stock market suffered as a result of misleading financial information published by the corporation. There has been much Securities Act litigation, particularly responding to the

5. The story of the experiment and the efforts to determine its effects is set forth in the RAND Report and the Report of Federal Judicial Center. See JAMES S. KAKALIK ET AL., *JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT* (RAND Inst. for Civil Justice, 1996); JAMES S. KAKALIK ET AL., *AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT* (RAND Inst. for Civil Justice, 1996); Donna Stienstra et al., *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990* (Federal Judicial Ctr., 1997).

active stock markets of the last decade. Many business leaders have contended that these claims are unjustified and are prosecuted simply to create lawyers' fees. Congress assumed that these contentions were correct, and hence determined that the securities litigation typically was frivolous and designed to procure "blackmail" settlement.⁶ Accordingly, legislation was adopted that altered the burden of pleading on plaintiffs in this category of litigation.

The other recent procedural reform adopted by Congress addresses litigation between taxpayers and the Internal Revenue Service. As one can imagine, Congressional sympathy was in favor of the taxpayers, including not only individuals but corporations. Here, Congress assumed that the typical taxpayer was a "David" who had been made into a long-suffering victim of bureaucratic oppression. There is no question that the Internal Revenue Service had from time to time acted abusively. However, it is a matter of common knowledge—and certainly within the knowledge of people familiar with the administration of the federal tax law—that many taxpayers abuse the Government. Put simply, there are many, many tax cheats, whose illegal conduct necessarily imposes costs on the rest of us. The question therefore was necessarily one of proportion: what is the extent of abuse by the tax bureaucracy, and what forms does it take, compared with the measure of tax evasion by taxpayers and their abuse of litigation to hide or postpone their tax obligations? However, Congress made little inquiry into these circumstantial details. Instead, its approach was to alter the burdens of proof in favor of taxpayers and provided them with favorable rules concerning litigation expenses.⁷

I do not wish to address the merits of these special provisions. I simply note that in both instances Congress proceeded without systematic evidence or inquiry concerning the incidence and characteristics of these types of litigation between individuals and bureaucracies. For all we know, and for all that Congress knew when it enacted these special rules, the typical Securities Act claim was well-founded, although it was also true that some such claims were not well founded. Similarly, for all we know, and for all that Congress knew, in most litigation between the Internal Revenue Service and individual taxpayers, the taxpayers' positions are dubious and in some instances ludicrous. The point is that it is easy but

6. See Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. (1995) Pub. L. No. 104-67, 1995 HR 1058, 109 Stat. 737 (1995).

7. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206 (1998).

fallacious to generalize from exemplary cases. Indeed, many lawyers, and not just common law lawyers, tend to think in terms of exemplary cases. The more difficult task is to think in quantitative terms about patterns of cases and variations on patterns.

In the modern legal world, a predominant pattern of legal conflict is litigation between individuals and bureaucracies. Of course, litigation between large business entities persists and is salient, as does litigation between government agencies and large business entities and other large private organizations. Legal disputes continue to arise between individuals, for example disputes between motorists, adjoining landowners, between landlords and tenants, and small business venturers. However, parties to these kinds of disputes are subject to significant economic constraint against litigation abuse. The typical small stakeholder cannot afford to invest in the cost of litigation, nor, in systems where the loser must pay the winner's costs of litigation, can the typical small stakeholder afford to run the risk of incurring that obligation. When the parties to a legal dispute are both substantial bureaucracies, they usually have the resources to carry through in protesting about abuse of procedure on the part of their adversary, or at least to retaliate in kind. When the parties to disputes are both individuals, neither side can afford to pay for very much "due process." In countries where the contingent fee is permitted, such as the United States, the contingent fee system makes only a limited difference. This is because a plaintiff's lawyer cannot afford to invest much time in a case unless the financial returns are likely to be substantial.

In the modern legal world as it is evolving, however, an important pattern of legal conflict is litigation between individuals on one hand, including small merchants and tradesmen, and large organizations on the other hand. The constraints of economics generally do not operate properly in such situations. The individual has relatively few resources and no incentive to invest in a claim beyond its immediate value. The larger organization has larger resources and typically is a "repeat player," i.e., a litigant with incentive to deter other potential antagonists from pressing similar claims. The litigation incentives of the parties are not symmetrical.⁸

This lack of symmetry in litigation incentives between an individual and a bureaucracy creates serious difficulties in devising

8. This asymmetry and its implications are discussed in Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974).

remedies for abuse of procedure. The general rules of procedure broadly allow parties to commit resources to litigation as they see fit. Substantial investment in litigation costs is routine and presumably appropriate for an organization with large "repeat player" stakes. Yet the same measure of investment in litigation costs is prohibitive for an individual. The rules on party-and-party costs, whether the "American" rule or the rule prevailing in most legal systems, do not take this strategic disparity into account. The contingent fee system which has evolved in the United States has certain benefits in this respect but also has limitations, particularly in cases involving low monetary stakes. Conspicuously, the reforms proposed in the Woolf Report for England and Wales seem to take little account of this dimension of the problem.⁹

Closer attention must be given to more liberal procedures for "group litigation." One example is the class suit in the United States, a procedure that has become both famous and infamous. Another is litigation by public officials on behalf of specific groups of citizens. An example in this country is the recent litigation against the tobacco companies by the attorney general offices of various states. Another example is sponsorship of litigation by political and civic organizations, for example litigation by civil rights organizations such as the NAACP. My colleague Michele Taruffo reports similar developments in Europe, for example, through labor unions. The common theme is to provide a better balance of procedural resources between individuals and the various bureaucracies with which individuals must interact in the modern era. Achieving a better balance is a world-wide challenge.

9. See ACCESS TO JUSTICE, FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES ch. 7 (1996) (Woolf Report).