A professor’s perspective: Just procedures and just results
by Dr. Wade Robson

One method of trial once practiced in England was to toss the accused into water consecrated by a priest. It was assumed that the laws of England reflected God's laws, and since consecrated water would presumably refuse to accept someone who had broken God's law, the guilty would float and the innocent sink.

Such a procedure is effective in guaranteeing a high conviction rate, for the odds of acquittal are long. That is one of its disreputable features: the guilty are convicted at the expense of the innocent. But that the odds are long is symptomatic of a more fundamental difficulty. That is that one's fate is determined by a factor independent of whether or not one has committed a crime.

"Trial by drowning" fails to meet two conditions any just procedure must satisfy. First, a just procedure must produce just results more often than not. Since we know that innocent persons are sometimes accused of crimes and since trial by drowning produces an almost 100 per cent conviction rate, we know that it convicts the innocent too frequently. But even if it somehow produced correct results all the time, we would still not use it out of considerations of justice. In addition to producing just results more often than not, a just procedure must produce them in a certain way. The second condition for a just procedure thus concerns the procedure itself, how a result is reached: it must be reached reasonably. Trial by drowning is simply not a reasonable procedure; it is not reasonable to suppose that one's innocence or guilt determines whether one floats or sinks.

What has developed in English-speaking countries since the time of the Norman Conquest is a trial procedure that attempts to reflect these two requirements of justice. The canons of a trial — the requirements for evidence and restriction on its admission, the standards for judges' directions to juries, and so on — are designed, in John Stuart Mill's phrase, to "determine the intellect." They are designed so that a reasonable person will judge that the result reached was a reasonable one. That is not to say that every trial will be perceived to have produced a just result. A perfectly just procedure would convict those and only those who had committed a crime, and no such procedure is available for determinations of guilt and innocence or for any other social decisions. We must contend with human nature and recalcitrations of the world. The consequence of having at best an imperfectly just procedure is that we cannot always know what the correct decision should be. The crucial feature of such a procedure is that even though there may be disagreement about whether the result of a particular trial is just, there is not to be disagreement about its reasonableness, given that the procedure was followed.

Reliance on reasonable procedures shapes not only our trial system and all other facets of our judicial systems, but also all legislative and executive action. In each and every instance in which a public official must make an official decision affecting the body politic, he must come to a decision that, by the nature of the case, may be mistaken. He must balance rights against rights, rights against interests, interests against interests, and in that balancing there is no way to guarantee the correctness of the decision. Faced with that fact, we rely upon procedure. As Justice Brandeis once put it, "One can never be sure of ends — political, social, economic. There must always be doubt and difference of opinion." About means, however, "Fundamentals do not change; centuries of thought have established standards. Lying and sneaking are always bad, no matter what the ends." It is the way in which decisions are reached that is of crucial moment in our society. Having no independent way of determining what a correct decision ought to be, we let the process run its course to its reasonable end, and we assume that that end is just.

We thus appeal to the second feature of a just procedure, that it be reasonable, in order to have a guarantee regarding the first — that it produce just results most of the time. Our assumption — the one that underlies our entire system of government — is that reasonable procedures are enough to guarantee justice.

This is an ideal, and there is no need to illustrate our fundamental commitment to it as an ideal by pursuing the lessons of Watergate, for instance. But gaining justice is a continuous process, and we ought not to suppose ourselves so far advanced from Norman England as to have found the ultimate just procedures. On the one hand, it is unclear that we have found them, and on the other, it is clear that even if we have, we too often fail to use them in the various parts and levels of government.

An illustration of our failure to use just procedure concerns a link in our criminal justice system. A typical case once recounted in Life is that of Santiago. He is being visited for the first time by his court-appointed lawyer, Erdmann, just before the two are to go before the judge to enter an initial plea of innocence. At the time of the interview, Santiago, too poor to raise bail money, has already been in jail ten months. Erdmann lays out the alternatives: "Well, it's very simple. Either you're guilty or you're not. If you're guilty of anything you can take the plea and they'll give you a year, and under the circumstance that's a very good plea and you ought to take it. If you're not guilty, you have to go to trial."

"I'm not guilty." He says it fast, nodding, sure of that.
"Then you should go to trial... If they find you guilty you might get fifteen years."

Santiago is unimpressed with all of that. "I'm innocent. I didn't do nothing. But I got to get out of here. I got to..."

"Well, if you did do anything and you are a little guilty, they'll give you time served and you'll walk."

"Today? I walk today?"

"If you are guilty of something and you take the plea."

"I'll take the plea. But I didn't do nothing."

"You can't take the plea unless you're guilty of something."

"But I didn't do nothing."

"Then you'll have to stay in and go to trial."

"When will that be?"

"In a couple of months. Maybe longer."

Santiago has a grip on the bars. "You mean if I'm guilty I got out today?"

"Yes."

"But if I'm innocent, I got to stay in?"

"That's right."

It is too much for Santiago. He lets go of the bars, takes a step back, shakes his head, turns around and comes quickly back to the bars. "But man —"

His options are more palatable, but Santiago might as well be in Norman England as far as the justice of what is happening to him is concerned. To be incarcerated for ten months awaiting trial, with no determination of guilt, and then to be marched before a judge and faced with the prospect of ten months, count for his sentence or going back to jail if he wishes to pursue his right to a trial, is not justice but extortion. The law calls it "plea bargaining." This would not be a serious fault with the criminal law system if it were rare, but it has grown enormously in the last thirty years. In New York City in 1974, for instance, eighty per cent of the felony cases were settled by plea bargaining, and to the extent that such bargaining exists, the criminal law system is unjust. We can hardly give voice to the ideals of justice and in good conscience allow such deviations from them to exist.

This is especially so since this sort of problem can be eliminated: We know what the facts are and we know what ought to happen happen is a matter of will. But the other problem is not so easy. That concerns the basic allocation of benefits and burdens in our society — of liberty and opportunity, wealth and income. The present distribution seems haphazard rather than the result of a concern for justice. This may have come about because decision making regarding public policy, at both the legislative and executive levels, too often reflects the balancing of interest groups rather than interests or justice. But even if the procedures are faulty and we correct them in some way, we are little nearer a solution, for we have no clear concept of what a just society would be.

In any society there are differences in what we may call natural starting points — differences in native intelligence, and determination. These differences are not the faults of those born with them, and it seems prima facie unjust to distribute benefits and burdens to reflect this original distribution of natural assets when it is itself arbitrary. So justice would seem to require a more equitable distribution than we currently see in our society, with its vast disparities of wealth. This would be true even if we did accept as a principle of justice that we ought to match benefits and burdens with natural assets. For the disparities in wealth make for differences in what we may call social starting points — the ability to utilize one's natural assets to best advantage by living in neighborhoods with good schools, getting positions in the best firms through social contacts, and so on. Two persons with the same natural starting points can end up with radically different benefits and burdens because their social starting points were different. Disparities in wealth, in short, seem to cause inequality in opportunity, and that is unfair because one begins with an advantage over another when the advantage is not the result of natural assets.

These points for equality must be balanced, however, at least against problems of incentive. If benefits and burdens were distributed equally, no one would have any material reasons for utilizing his natural assets, and no society could long survive, just or unjust, without its citizens striving for improvement. So what seems necessary in order to have a society seems to make impossible an equal distribution of benefits and burdens. One need not even ask whether such a distribution would be just.

But what would be just? Do we try to match benefits and burdens with natural assets? That would be unjust because the original distribution of natural assets is arbitrary. Do we adopt philosopher John Rawls's theory that all benefits and burdens ought to be distributed equally unless an unequal distribution is to everyone's advantage? That seems the most just alternative. What benefits and burdens one receives does not depend upon how poorly one fares in the distribution of natural assets, but since one can utilize one's natural assets to gain advantages (if those are also to everyone's advantage), persons do have incentive. But how are we to tell when an unequal distribution is to everyone's advantage? The complications of calculation stagger the imagination, and without some criteria for telling, the theory licenses almost any inequality.

One may pile principle upon principle and difficulty upon difficulty. For there is great debate and as yet no essential agreement either upon what is the proper principle of justice or upon how to decide what should be. Yet some such principle is required. It is required if we are to fulfill the commitment we made when we ordained and established a Constitution in order to "establish justice." For the procedures we have used, however reasonable, have not led to completely just results in regard to the basic distribution of benefits and burdens. This is clear whatever principle is adopted. But that we are in disagreement about what principle to accept is a sign for hope. That disagreement and the debate it engenders are healthy signs of our concern for a just society.

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