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## Religion and Procedure

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## RELIGION AND PROCEDURE

*Robert E. Rodes, Jr. \**

When I began telling my colleagues at Notre Dame that I had been invited to prepare a paper on religion and procedure, some of them said "How interesting," and looked vague. Others, more forthright, came straight out and asked what on earth I was going to say. The reaction is understandable. Since God made everything, there is nothing that cannot be related to religion if you work at it, but procedure seems to be harder going than most things. It is all very well to talk about God ruling the world and the state exercising authority on His behalf. But God does not seem to have any procedure.<sup>1</sup> It is fairly easy, if you go in for analogies of that kind, to think of God as a lawgiver, even as a judge. But to think of Him as a sheriff or a process server stretches most people's imaginations farther than they will comfortably stretch.

But it does not follow that the attempt to relate religion and procedure is futile. It is the business of human authority to do justice on behalf of God. If I were talking about substantive law, I would have to say what I mean by justice; but when I am talking about procedure, I can use it without defining it, as the framers of the Federal Rules of Civil Procedure did.<sup>2</sup> The point is that when God chooses to do justice on His own behalf, He has facilities human beings lack. This is

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\* Professor of Law, Notre Dame Law School. This article collects ideas adumbrated in my works, *THE LEGAL ENTERPRISE* 6-8, 91-115, 140-44 (1976); and *LAW AND LIBERATION* 33-35, 98-122, 187-88 (1986).

1. *But see* Fortescue, J., in *R. v. University of Cambridge (Dr. Bentley's case)*, 1 Str. 557, 567, 93 Eng. Rep. 698, 704: "I remember to have heard it observed by a very learned man . . . that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God) 'where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also."

2. *See* FED. R. CIV. P. 1: "These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action.": Rule 15(a): "a party may amend his pleading . . . by leave of court . . . and leave shall be freely given when justice so requires." Rule 16(e): "The order following a final pretrial conference shall be modified only to prevent manifest injustice." Rule 16(f): "If a party or party's attorney fails to obey a scheduling order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge . . . may make such orders with regard thereto as are just. . . ." Rule 26(c): "The court . . . may make any order which justice requires to protect a party or persons from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Rule 61: "No error . . . is ground for . . . disturbing a judgement or order, unless refusal to take such action appears to the court inconsistent with substantial justice."

why human beings develop procedures. Procedures are ways of trying to do God's business without being God. It is this source of procedural rules that determines how they are structured, what can go wrong with them, and how we should use them.

Shakespeare provides a fairly familiar illustration with Portia's dictum that

. . . earthly power doth then show likest God's  
When mercy seasons justice. . . .<sup>3</sup>

In fact, though, God does not season justice with mercy. He is entirely just and entirely merciful at the same time. It is not until we start deploying earthly power that we have to start thinking of trade-offs. Earthly power will never show exactly like God's, but it will show more like it if we sacrifice a little justice for a little mercy and vice versa than if we try to be as just as we can regardless of mercy, or as merciful as we can regardless of justice.

Furthermore, earthly power cannot pursue anything with the singleness of purpose that is possible to God. God is not included in Lord Acton's observation that power tends to corrupt.<sup>4</sup> When His Word goes forth, it does not return to Him void: it does exactly what He sent it for (*Isaiah* 55:11). But earthly power, if it is not restrained, will take off in directions entirely different from the ones in which it is meant to go. We must limit its capacity to do its work in order to limit its capacity to go astray.

It is in order to restrain power in this way that we maintain the whole set of principles and practices that support what we call the rule of law. These go to assure us that no one will exercise power except within specified limits, and that anyone's power on the edges of those limits will be confronted with other power. Power cannot be relied on to implement mercy and justice unless it is restrained in this way; yet a certain amount of mercy and justice have to be sacrificed if power is to be restrained. The obvious example, is the fourth amendment. To protect against the injustice of unreasonable searches and seizures, the mercilessness of police brutality, we erect restraints that expose us to the injustice of aggression with impunity, the mercilessness of crime. There are more examples in administrative procedure. We do not dare turn administrators loose to implement broad policies of justice and mercy free from obscurantist and hampering restraints. The policies suffer accordingly. As Justice Cardozo said in the

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3. THE MERCHANT OF VENICE, Act IV, scene 1.

4. Letter to Bishop Mandell Creighton, April 5, 1887.

*Schechter* case, "A roving commission to inquire into evils and upon discovery correct them"<sup>5</sup> is unacceptable. But a certain number of evils are bound to go uncorrected because of that inescapable mistrust.

God is all-wise and all-knowing as well as all-powerful. The facts He knows and acts on are always the true facts. He is fully informed although He hears no evidence, and He acts with due deliberation although He does not deliberate. But in human tribunals facts must be learned, and as learned they must be discussed and reflected upon before they can support decision. The process can take so long that the result is worthless. Even then, the decision can be the wrong one. The facts as learned may not be true facts, or the discussion and reflection may have left important considerations out of account.

So, while we have rules of pleading, evidence, and discovery in court, and rules of notice and hearing in administrative agencies to assure due deliberation and formalize the pursuit of truth, we have to balance them with rules of *res judicata*, administrative finality, and the like to keep that deliberation and that pursuit from indefinitely delaying justice. Then, to keep the latter rules from perpetrating too gross an injustice, we have to provide them with exceptions such as the grounds for setting aside a judgment under Federal Rule 60(b).<sup>6</sup> Then, to keep the reopening of judgments from becoming too oppressive, we have a one-year limitation on most of the grounds for invoking 60(b). And the courts have had occasion to create a few exceptions to the one-year rule.<sup>7</sup>

In His dealings with individuals, God is fully personal and fully

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5. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

6. FED. R. CIV. P. 60(b) reads in part as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

7. The classic case of a judgment set aside after the year envisaged in Rule 60(b) is *Klapprott v. United States*, 335 U.S. 601 (1949). The government had brought a proceeding to denaturalize Klapprott at the same time as they had jailed him on sedition charges and intercepted his letter to the American Civil Liberties Union asking them to defend him. The de-

objective at the same time. He responds to every person according to that person's unique situation and inmost being, yet He does not fail to treat like cases alike. But in the exercise of human authority and judgment, human encounter and objectivity must be traded off against one another. As a lot of science fiction shows us, we feel wronged if our affairs are turned over to a computer instead of a human being.<sup>8</sup> On the other hand, we feel equally wronged if a human being deals with us just as he pleases without being subject to objective criteria or standards of accountability.<sup>9</sup>

We try to maintain the necessary balance in our judicial and administrative procedures by allocating discretion at different levels, putting most of the personal encounter at the lowest levels, and increasing the objectivity as we move up. For instance, we generally require a criminal defendant to be present in court when he is tried,<sup>10</sup> but the appellate process shifts from scrutiny of the defendant to scrutiny of a paper record. Similarly, at the trial level, we defer to the opportunity of the trier to see the witnesses live, and we encourage judge or jury to draw on human intuitions to understand the facts and deal justly with them.<sup>11</sup> But when the trial is over, we put the whole matter before an appellate court that scrutinizes not the merits of the case but the conduct of the trial, and scrutinizes it in the light not of subjective judgments but of objective principles. Similarly, in an administrative agency, our first encounter is with an official of some kind who has discretion in dealing with our affairs. But his discretion is limited by guidelines from above, and by supervisory personnel who will apply those guidelines. In other words, we balance the competing values of personality and objectivity by using a structure with several tiers, with more personal encounter at the bottom, and more objectivity at the top.

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fault judgment of denaturalization was set aside on a motion brought when he got out of jail, after spending six years incarcerated for crimes of which he was never convicted.

8. I am thinking particularly of Woody Allen's *Sleeper*, in which the main character is made to confess his sins to a computer as part of a re-education program. See also "Computers" in *THE SCIENCE FICTION ENCYCLOPEDIA* 133-34 (P. Nicholls ed. 1979).

9. See K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

10. See *FED. R. CRIM.* P. 43.

11. See *FED. R. CIV. P.* 52(a): "... due regard shall be paid to the opportunity of the trial court to judge the credibility of the witness." See also Chesterton's remark on the jury:

Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is too important to be trusted to trained men. If it wishes for light upon that awful matter, it asks men who know no more law than I do, but who can feel the things I felt in the jury box.

I found this quote as an Epigraph in *I THE LAW IN LITERATURE* (1960); I have not been able to run down the original source.

In manifesting Himself to the world, what God does is what He appears to do. He does not give conflicting messages or express one thing and accomplish something else. Human authority, by contrast, must always consider what it is teaching or expressing as well as what it is accomplishing.<sup>12</sup> We have to worry about whether our methods of weeding out welfare cheaters express contempt for the poor or whether our protections for persons accused of crime diminish the seriousness with which crime appears to be taken.

Accordingly, we have many procedural rules that preserve some of the symbols of what our system stands for, and sometimes preserve them at the expense of a certain amount of truth, justice, or both. As Justice Holmes put it in an early wiretap case, "I think it a less evil that some criminals should escape than that the Government should play an ignoble part."<sup>13</sup> Many of our rules on notice, publicity, service of process, opportunity to be heard, suppression of evidence, subpoenas, and defaults have no higher purpose than to keep the government from playing an ignoble part. And many of them achieve that purpose not only by letting some criminals escape but also by letting some justice between party and party not be done.

Conversely, some rules allow both citizens and values to be treated with a certain amount of symbolic disrespect in order that truth may be more fully developed or the just concerns of parties and government be better served. The rules of cross-examination are often of this kind, as are the rules governing administrative investigations, particularly in the realm of welfare and entitlements. It often becomes necessary to adjust the balance with measures such as the declaration system in welfare application procedure (accepting the word of the applicant subject to later spot checking)<sup>14</sup> or rape shield legislation (forbidding the accused to defend himself by a broad gauge attack on the chastity of the victim).<sup>15</sup>

In all these situations, qualities that are fully realized in God turn into antinomies when human authority seeks to implement divine judgment. Power on the one hand, justice and mercy on the

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12. Note in this connection Professor Lawrence Tribe's distinction between "intrinsic" and "instrumental" conceptions of due process. *AMERICAN CONSTITUTIONAL LAW* 501-06 (1978). In the one view, procedural safeguards are required by human dignity; in the other, they make it more likely that an accurate result will be achieved. The two views are, of course, not incompatible.

13. *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

14. *CASES ON SOCIAL WELFARE AND THE INDIVIDUAL* 382-84 (Levy, Lewis, & Martin eds. 1971).

15. See, e.g., *FED. R. EVID.* 412; *IND. CODE* 35-37-4-4.

other, deliberation and despatch, personal encounter and objective criteria for decision, symbol and reality all have to be traded off against each other when earthly power seeks to show likest God's. The multiple procedures; civil, criminal, and administrative, that we have implanted in our legal system and turned over to our lawyers to administer are built around these antinomies.

Most of our pathologies of procedure come from throwing one or another of these antinomies out of balance. The breakdown of law and order comes from overstressing restraints on power, the police state from understressing them in order to leave power free to accomplish its just and merciful ends. Uninformed and ill-advised decisions, the rush to judgment, come from taking too seriously the maxim that justice delayed is justice denied. But bureaucratic bungling, crowded dockets, and delay that may be tantamount to denial after all come from insisting on complete information and moral certainty before setting the law in motion. Arbitrary and capricious decisions come from trying to be too personal, mechanical and uncaring decisions from trying to be too objective. Hypocritical procedures come from stressing the symbols of justice at the expense of the reality, demeaning ones from stressing the reality at the expense of the symbols.

The technical skills of achieving a balanced procedure are no part of my subject in this paper. They are imparted in first year civil procedure and criminal law courses, in second or third year administrative law courses, and in meetings of bar associations and judicial conferences all over the world. Underlying all of them are skills of heart and mind that relate more directly to our topic, law and religion. They teach us to take the theological considerations just discussed and relate them to our personal practice of our profession.

I have said that we have procedures because we are called to do God's business without being God. On this understanding, we cannot make an idol of our procedure. Nor can we dispense with it and seek to judge as God does. We must keep truth and justice before our eyes, and yet move with the respect and diffidence that befits one human being intervening in another human being's affairs.

Idolatry of procedure is endemic in our profession. There is a traditional question as to the duty of a judge who has personal knowledge of the justice of a poor widow's claim which she cannot prove because her adversary has intimidated all the witnesses<sup>16</sup>—or, to put the same question more poignantly, the duty of a judge who knows a

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16. See J. NOONAN, BRIBES 730-31 (1985).

criminal defendant is being framed. The traditional commentators insist that a judge, *qua* judge, knows nothing but what is put before him in the shape of admissible evidence. He must decide the case according to what he knows in this way regardless of what he really knows—that is, regardless of what God knows. Of course, this is not all black and white. The judge may have a certain amount of personal knowledge and not know for sure. To disregard the need for admissible evidence is to go too far. But to disregard manifest truth is idolatry.

There is idolatry, too, in the eighteenth century (and sometimes later) attitude toward the rules of pleading. These rules responded at their inception to serious concerns with the power of medieval judges to decide cases and the ability of medieval juries to determine facts.<sup>17</sup> Even, today, they can be made the basis for a perfectly respectable system for running lawsuits, as they were in the New Hampshire courts under the leadership of their great nineteenth century chief justice, Charles Doe.<sup>18</sup> But to make them into a vehicle for displaying the erudition and logical acumen of their practitioners, to make them avoid, rather than enhance, the development of the merits of the cases, simply on the fideistic assertion that “We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion.”<sup>19</sup> is to make the forms of pleading into idols.

Another kind of idolatry treats legal process as a contest of forensic skills between lawyers. When I was a little boy, Bruno Richard Hauptmann was being tried for the kidnap murder of the Lindbergh baby. I saw a picture in the paper of the two lawyers in the case shaking hands. The paper had captioned the picture “May the best man win.” When I grew up, I wondered why the editors were so cheerful about a man’s life or death depending on whether the defense counsel or the district attorney was the better lawyer. But the attitude is not rare. Roscoe Pound has a chapter on it in *The Spirit of the Common Law*.<sup>20</sup> He attributes it to the mores of the frontier. In that it turns the process into an end rather than a means, I think it can properly be called idolatrous.

There is a lot in our criminal procedure today that can also be

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17. R. MILLAR, CIVIL PROCEDURE IN THE TRIAL COURT IN HISTORICAL PERSPECTIVE 21-22 (1952); C. CLARK, CODE PLEADING 13 (1947).

18. See J.P. REID, CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE 93-108 (1967).

19. *Scott v. Shepherd*, 2 W. Bl. 892, 897; 96 Eng. Rep. 528 (Blackstone, J.).

20. R. POUND, THE SPIRIT OF COMMON LAW 112-38 (1921).



called idolatrous. We keep assuring one another that we maintain all our procedural complexities either to see that innocent people are not convicted or to deter police from illegal inroads on citizens' rights. But these assurances seem more and more hollow as time goes by. They come more and more to resemble the assertions of our ancestors that we must keep up the boundaries of actions lest the utmost confusion ensue. The procedures are now so cumbersome that the Supreme Court has held it only reasonable for a prosecutor to seek an additional thirty years in prison for a defendant who refuses to waive them.<sup>21</sup> I believe it is a form of idolatry to keep them in place.

If adherence to procedures without regard for their God-given purpose is idolatrous, pursuit of the purpose without regard to procedure is blasphemous. It is to usurp the prerogatives of God. Except perhaps for the disguised Caliph in the Arabian Nights, no judge has really ventured to do without procedure entirely; but some have gone far enough in that direction to raise a question whether they fully appreciate the difference between God's powers and their own. Among Anglo-American lawyers, the inquisitorial procedures of the Star Chamber and the High Commission have perhaps a worse reputation than they deserve in this regard; but both the objections and the justifications that they elicited will illustrate my point.<sup>22</sup> The opponents and supporters of administrative discretion in our own time make very similar arguments. On the one side, it is considered intolerable that the beneficent purposes of government should be hampered with inherited and inefficient procedural forms. On the other side, it is suggested that government is not all that beneficent, and it will become still less so if it is allowed to function without information, deliberation and accountability. The more we reflect that our judges and administrators are not God, the more we will come down on the side of procedure.

Certain lawyers, identified with the so-called Critical Legal Studies movement, have proposed "delegitimizing" the tribunals before which they appear.<sup>23</sup> Their claim is that these tribunals and their procedures confer a spurious legitimacy on the hierarchical structures they serve. There is a certain family resemblance between the claim

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21. See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

22. See G.O. TREVELYAN, *ENGLAND UNDER THE STUARTS* 168-69 (1904). On the High Commission, see my *LAY AUTHORITY AND REFORMATION IN THE ENGLISH CHURCH* 158-59, 195, 207-11 (1982).

23. See Gabel and Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. OF LAW AND SOCIAL CHANGE 369 (1982).

that the beneficent purposes of government will be better served without procedures and the claim that the beneficent purposes of no government will be better served without procedures. In one case the judge plays God, and in the other, the lawyer does.

Besides making idols of our procedures on the one hand and doing away with them on the other, there is a third way of belying our creatureliness in the realm of procedure. That is to lose respect for the fellow creatures with whom we deal. If we deploy procedures that demean the participants, as many welfare agencies do; if we deploy procedures that the participants cannot understand (try explaining the defendant's interrogatories to a member of the plaintiff class in a civil rights class action); if we let an accused rapist who claims he is innocent plead guilty of simple assault because the prosecutor and the public defender are both too busy to go to trial; if our procedures are so slow that a personal injury claimant has to settle for half what his case is worth or starve waiting for his trial date—if any of these things happen—and God knows they all do—we are failing to recognize God's creature and our own fellow creature in the person with whom we deal.

It remains for us to see how these reflections apply to the individual lawyer settling down with a form book and a yellow pad to decide what moves to lay next on the other side. Lawyers with a flair for procedure can use their professional skills in more ways than one. They can work for a clear, swift and succinct presentation of the merits of both parties' claims, followed by a thoughtful and well-informed decision. Or they can work for trivialization, harassment, confusion, obfuscation, and delay, hoping to wear the other party out or run his legal fees so high it is not worthwhile to continue. The reflection that it is God's business that is supposed to be getting done in our all too human tribunals may be of some help in deciding which way to go.

But our full cooperation in the process depends on some assurance of the possibility of God's business in fact getting done. This means that the substantive law that is going to be applied must meet reasonable standards of justice, that the tribunal must have reasonable integrity, that the procedures must be reasonably calculated to yield a decision on the merits, and that they must be comprehensible and affordable. If these conditions are met, then I think it is our responsibility to use our procedures as they are meant to be used, that is, to develop the merits as clearly as possible for an expeditious decision.

But to the extent that these conditions are not fulfilled, our duty becomes more ambiguous. Where the system turns aside from its di-

vinely ordered purpose, we may have occasion to go with the purpose and let the system take care of itself. What pro bono lawyer, despairing of the sad state of one or another branch of the substantive law affecting the poor, has not gone back to his depositions and interrogatories with renewed vigor after reflecting on the number of two hundred fifty dollar hours his adversary's lawyer will have to spend answering them? And can we blame him?

The ethical questions in procedure are for the most part familiar. Is it acceptable to use discovery to delay an opponent's case or to run up the clock? Is it acceptable to deny an allegation you know is true but think your opponent cannot prove? Is it acceptable to object to evidence that is relevant and persuasive, but disqualified because by some technical rule? Is it acceptable to claim a jury trial because you think a jury will be more impressed by your opponent's balance sheet than by the judge's instructions? Is it acceptable to gain forensic advantages from the failure of your opponent to prepare for a pretrial conference? Is it acceptable to show disrespect for a judge who seems to be biased against you (I am thinking of a scene of Paul Newman's in *The Verdict*)?

It seems to me that what most characterizes a religious approach to procedure is to have no ready made universal answer to these questions.<sup>24</sup> It is God's purpose to manifest His justice in the world, and each one of us is called, just as the whole system is called, to carry out that purpose on His behalf. In doing so, we must both support the system and supplement it. We must recognize and allow for its failings without exacerbating them. If the wheels of justice grind badly, we may want to do a little supplementary grinding on the side. But we are not to give up on them, because God has set them up. If a particular judge or tribunal is acting illegitimately, we may have occasion for some delegitimizing work. But we cannot delegitimize the whole system, because God has made it legitimate.

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24. I believe Mr. Lohn is quite mistaken when he says in his thoughtful response to my paper that the real world gives no scope for discretion in answering these questions. I think it would be a rare case in which a conscientious lawyer would be either disciplined or held liable for malpractice for answering any of them one way or the other.