

1982

A Rejoinder to "The Judge's Role in Educating the Public about the Law"

Abner J. Mikva

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Abner J. Mikva, *A Rejoinder to "The Judge's Role in Educating the Public about the Law"*, 31 Cath. U. L. Rev. 209 (1982).

Available at: <https://scholarship.law.edu/lawreview/vol31/iss2/8>

This Symposium is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

A REJOINDER TO "THE JUDGE'S ROLE IN EDUCATING THE PUBLIC ABOUT THE LAW"*

*Abner J. Mikva***

I share Marna Tucker's major premise that the law is the "mechanism through which individual and group relations are defined and adjusted."¹ I vigorously applaud her statement that no other country in the history of the world has used the instrument of law so effectively in bringing about necessary change through evolution rather than by revolution.² As the late Justice Robert Jackson said: "Struggles over power that in Europe call out regiments of troops, in America call out battalions of lawyers."³

I share her additional premise that there is a great deal of mystery, misinformation and downright ignorance about how the law functions and about the role of the judges, the lawyers, and the litigants.⁴ These problems are attributable, as she points out, to an abysmal ignorance about the Constitution, the laws, and the traditions of our country.⁵ I remember the experiment during the heyday of the late Senator Joseph McCarthy of Wisconsin, when an enterprising newspaper editor put the Bill of Rights of our Constitution on a sheet of paper and asked citizens at random to sign it if they agreed with the contents. A majority refused to sign the document, the most common reason being that the document reflected communist philosophy! And I certainly agree that television is not a likely teacher to improve the country's high rate of constitutional illiteracy. The whole process of law is Perry Masonized by television, and this becomes part of the problem rather than the solution.

Our disagreement stems from what we should do about it. Even here,

* Prepared in response to a speech by Ms. Marna Tucker to the American Bar Association "Conference on the Role of the Judge in the '80s," June 19-20, 1981, in Washington D.C.

** Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit.

1. Tucker, *The Judge's Role in Educating the Public About the Law*, 31 CATH. U.L. REV. 201, 201 (1982).

2. *Id.*

3. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* xi (1941).

4. Tucker, *supra* note 1, at 202.

5. *Id.*

the disagreement is not one of the entireties; rather, it goes to some of the specifics that Ms. Tucker proposes. Let me address the items in disagreement.

Ms. Tucker suggests that “[j]udges should make [it] a point to explain their decisions in actual cases to the groups affected.”⁶ If this were merely a gentle suggestion that judges write clearer (and perhaps shorter) opinions, I would accept the criticism. As a lawyer, a legislator, a judge, and a citizen, I have often complained that judicial opinions do not adequately explain the *ratio decidendi* of the case. But that is not the thrust of Ms. Tucker’s criticism. She suggests that judges should use a second vehicle, *in addition* to the judicial opinion, to reach the non-legal community. She suggests that “lay language” be used⁷ and that elected judges especially should educate the electorate as to why they have done what they have done.⁸

I once had a job where explanations to the electorate were greatly in order. Every two years, I was required to explain and defend my judgments, sometimes successfully and sometimes unsuccessfully. But I was in a policy-making arena where the decisions were being made in a legislative body, where passions and prejudices and compromises were the coins of the realm. I could rail against my colleagues in Congress or the state legislature, blame the Chief Executive for failing to lead, or criticize my fellow citizens for not sending me enough good colleagues to carry the day. I could explain to my constituents’ satisfaction that I had gone as far as it was possible to go and still achieve some progress—that I had engaged in reasonable compromise. But no one ever pretended that there was only a single right answer to the problem under debate.

The arena in which policy decisions are made in no way can, or should, resemble the arena in which individual justice is distributed.⁹ Pejorative as it may sound, the suggestion that judges go “out on the hustings”¹⁰ con-

6. Tucker, *supra* note 1, at 207.

7. *Id.*

8. *Id.*

9. There are obvious similarities between the roles of judges and legislators. Each requires application of reason to statutes, analysis of facts, and the rational treatment of complex issues. See, e.g., B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); Hazard, *The Supreme Court as a Legislature*, 64 *CORNELL L. REV.* 1 (1978). But the differences should be equally obvious. In some ways, the distinction I am drawing compares to the frequently discussed difference between finding “legislative facts” and “adjudicative facts.” See 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 15.03, at 353-63 (1958). Although the distinction may sometimes be hard to define, one “exceedingly practical difference” is that legislative facts are usually drawn from extra-record sources, whereas adjudicative facts only concern the parties directly before the court. *Id.* at 353.

10. Tucker, *supra* note 1, at 206.

judges up the image of the judge explaining his decision in the public square as the citizenry decides to put thumbs up or thumbs down.

My second criticism stems from the "second advantage" that Ms. Tucker finds in her suggestion—a "heightened appreciation by judges of the ways in which the law does not serve the public well."¹¹ This suggests a model whereby judges measure the wisdom of their decisions by the popular support that they command. I shudder to think what status our Bill of Rights or criminal justice system would have if each important judicial decision had to be measured by its popular support. Finley Peter Dunne, writing as Mister Dooley, delivered his "layman's" opinion on a dispute as to whether the Constitution followed the flag by opining that "the Constitution may follow the flag, but the Supreme Court follows the election returns."¹² Lawyers can chuckle at Mr. Dooley's homily, because Article III has immunized the federal judiciary from that kind of *vox populi* pressure. I do not think we would be well advised to go in the other direction. Even if I agreed that blind justice, the disinterested judge, or the dispassionate forum was only a myth—and I do not—I doubt that election returns could better serve to give judicial decisions their legitimacy.¹³

I very much want to arrive at the outcome Ms. Tucker suggests. I am even prepared to accept that some of the consequences of increased public knowledge and sophistication will be uncomfortable. However, the vehicle she proposes for arriving at that better land is a used car with bald tires, failing brakes, and an engine that could overheat very quickly. It is fit and proper for judges to be urged to speak with a plainer tongue, but to suggest that we have to persuade Madame Defarge of the correctness of our judicial decisions turns the prod into a guillotine, both for the independence of judges and for justice.

11. Tucker, *supra* note 1, at 208.

12. F. DUNNE, MR. DOOLEY AT HIS BEST 77 (E. Ellis ed. 1938) (with modifications in original spelling).

13. The question of what confers judicial pronouncements with their legitimacy in a democratic society has been discussed at far greater length than I have the ability to do here. See, e.g., A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); L. HAND, THE BILL OF RIGHTS (1958); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The inquiry has spawned an enormous body of literature, much of it critical. E.g., L. LUSKY, BY WHAT RIGHT? (1975); see L. HAND, *supra*, at 73 ("For myself, it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."). My point remains, however, that somehow making judges even more "accountable" to the general public is unlikely to enhance the perception of particular individuals that justice has been done in their particular cases. The same cannot be said of a system that encourages judges to be disinterested and dispassionate, with obligations to hear and respond to the contentions of *each* litigant before them, regardless of the press of "public" opinion.

