The Spoiling of Justice

An Institutional Autopsy: Ten Years, Ten Courts, Two Democracies, and the Price of Being Heard

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I. From the Primacy of Form to the Disappearance of Substance

La forme prime le fond.

The old French lament describes a familiar perversion, when form happens sometimes to take precedence over substance. Yet the expression presupposes that substance still exists, however neglected or subordinated. It does not mean that form is irrelevant; rather, that form should serve substance, not substitute for it.

What the author of these lines has witnessed is something more radical.

In the courtroom, form no longer takes precedence over substance. It has substituted itself for substance, rendering the latter unnecessary.

Once freed from the obligation to serve any substantive purpose, judicial form becomes a self-feeding system of procedures, conventions, and rituals whose validity is established by their own observance.

And a self-feeding system may generate its own feedback: what has acquired authority through judicial form becomes, in turn, a justification for further judicial action, whether or not its substantive foundation was ever examined.

The court need no longer discover what happened. It need only establish that a proceeding took place.

It need no longer determine whether an allegation was proven. It need only record that a judgment was entered.

It need no longer dispense justice. It need only produce the legally recognizable appearance of having done so.

The result is not merely the triumph of form over substance, but the disappearance of the very distinction between them.

Justice has become the hallucination of itself.

II. The Invisible Litigant

This is not an account of this writer's legal misfortunes in particular. It is rather an analysis of the general decomposition of justice, which he will attempt to demonstrate without recounting the nature of the complaints at the heart of his cases or the history of his disputes with his opponents.

The merits of those disputes have become irrelevant to this inquiry.

He will address procedure. He will address form. And he wishes to alert readers to a disturbing reality: that any of them may become vulnerable to judicial injustice if not endowed with sufficient financial resources.

Everyone is a potential victim.

Granted, every unsuccessful litigant believes, with varying degrees of justification, that justice has failed him. The world is full of disappointed plaintiffs and defendants, each convinced of the righteousness of his cause

and the injustice of its rejection. There is nothing particularly remarkable about that, nor would the particulars of their disputes be of much interest to the general public.

What is remarkable, though, and of potentially universal import, is what ten years of litigation before ten courts of law in two democratic countries have allowed this writer to observe about the administration of justice itself.

He has witnessed a phenomenon far more disturbing than the occasional judicial error or the dishonesty of an individual judge: the progressive spoiling of the judicial institution from within, through its own practices, habits, conveniences, and mechanisms of self-protection.

Here, spoiling describes the deterioration of organic matter from its original condition, the gradual destruction of its essential qualities. A piece of meat need not be poisoned to spoil. Left to itself, without adequate preservation, it will decay.

An institution can undergo a comparable process.

A judicial system need not be infiltrated by criminals or purchased by wealthy interests to become spoilt, or, as some would say, corrupt from within. It is sufficient that those entrusted with administering justice progressively cease to concern themselves with its essential purpose, while preserving the outward appearance of its procedures.

The courts remain open. Documents are filed. Hearings are scheduled. Judgments are entered. Appeals are heard or dismissed. The machinery continues to operate, sometimes with impressive efficiency.

But does it still administer justice?

That is the question this work seeks to examine.

III. The price of being heard

During the past decade, the author has experienced the administration of justice under radically different financial circumstances.

When he could afford attorneys, he prevailed, easily. When he could no longer afford them, he lost. The same cases. Sometimes the exact same arguments, verbatim.

When his opponents could not afford attorneys, proceedings remained dormant for years. Indeed: for years. When they recovered the means to pay for professional representation, the judicial machinery resumed its operation, notwithstanding this author's inability to participate on equal terms.

The contrast was not confined to the outcomes. It extended to the attention given to arguments, the treatment of evidence, the application of procedural rules, and the willingness of courts to examine what was actually before them.

Sometimes substantially identical arguments, occasionally expressed in exactly the same words, encountered radically different judicial responses depending upon whether they were presented by an attorney in federal court or by the litigant himself in state court.

The implications are considerable.

If the quality of an argument is determined by the professional status of its perceived author rather than its substance, the judicial system has ceased to

perform its most elementary intellectual function.

If evidence is examined when challenged by counsel but accepted without meaningful scrutiny when the opposing party is unrepresented, the rules of evidence become conditional privileges.

Counsel's pleadings may be replete with grammatical errors, defective syntax, and deficient reasoning, while those of the self-represented litigant may be carefully composed and rigorously argued. Yet the former command attention that the latter do not.

The signature is read not at the end of the pleading, but before.

If procedural safeguards are effectively available only to those who can afford to invoke and enforce them, equality before the law becomes a fiction.

And if the courts themselves perpetuate these conditions, the spoiling is not inflicted upon the institution from outside. It is generated and sustained by its ordinary functioning.

IV. The question of innocence is irrelevant in this paper

There is a simple way to separate the institutional question from the personal controversies that prompted these observations.

Suppose, for the sake of argument, that the author of these lines was wrong about every substantive claim he made.

Suppose that his opponents were entirely right, that every disputed obligation was genuine, and that every judgment against him reached the correct ultimate conclusion.

Would that justify denying him a meaningful opportunity to be heard, while affording that opportunity to his opponents?

Would it justify disregarding his arguments, as if they had never existed, dispensing with the examination of evidence, or allowing allegations to serve as proof of themselves?

Would it justify conducting proceedings in circumstances that made his participation impossible, and then using the consequences of that impossibility against him?

Of course not.

The purpose of a trial is precisely to determine who is right and who is wrong. The safeguards of judicial procedure are not rewards reserved for those who ultimately prevail. They are the means by which the legitimacy of a judgment is established.

A judicial system that dispenses with those safeguards because a litigant is destitute, unrepresented, inconvenient, far, far away, a citizen of another nation, or simply presumed to be wrong has inverted its own purpose.

It has made the outcome more important than the means by which the outcome is reached.

V. Justice without witnesses

One of the most revealing features of modern civil litigation is the extent to which judicial proceedings can become insulated from meaningful scrutiny.

A lawyer, however incompetent, possesses professional standing and the recognized ability to challenge irregularities in a language the court understands. A jury introduces citizens who are not members of the judicial profession. A verbatim record makes it possible to examine what occurred.

Remove these safeguards, and an unrepresented litigant may find himself confronting an institution whose decisions are authoritative but whose conduct is practically beyond examination.

The paradox is extraordinary. Or has it become ordinary?

The judicial system is entrusted with scrutinizing the conduct of others. Yet its own conduct may become least susceptible to scrutiny precisely when the person before it is least capable of demanding accountability.

Granted, the absence of meaningful oversight does not necessarily produce misconduct in every case. But it does create the conditions in which institutional indifference can flourish without correction.

And indifference, when exercised by an institution possessing the coercive powers of the state, is not a harmless administrative defect.

It can, and does, destroy livelihoods, homes, reputations, families, and lives.

VI. The people who cannot tell their stories

This author's experience is not likely to be unique.

How many other litigants have encountered comparable treatment in courts throughout the democratic world? Some may have suffered far worse consequences than the author of these lines.

But the most vulnerable among them are also the least likely to leave a coherent account of what happened.

A person who cannot afford an attorney may also lack the education necessary to understand judicial procedure, the means to preserve and examine a legal record, the confidence to challenge institutional authority, or the command of language required to explain the experience to others.

Many will simply disappear from the judicial statistics as unsuccessful litigants.

Their cases will be closed. Their judgments will become final. Their appeals, if any, will be dismissed. The institutional record will show that justice has been administered.

It will not show whether justice was done.

This silence creates a profound distortion in our understanding of the judicial system. The people best positioned to describe its failures are often those least capable of making themselves heard.

A few, however, may possess advantages that many destitute litigants do not. The author of these lines happens to be among them. He has spent much of his life writing, researching, analyzing evidence, and constructing arguments. He possesses the education, patience, and intellectual means to examine and describe the proceedings in which he has been involved.

He does not possess the financial means to compel the courts to listen.

But he can write.

And that is why he is writing.

Not to solicit sympathy, not to relitigate his personal disputes before the court of public opinion, and not to persuade the reader that he was invariably right.

He is writing because the institutions entrusted with administering justice must themselves be subjected to examination, particularly when their failures are most easily concealed by the poverty and powerlessness of those who suffer them.

The personal disputes that brought him before the courts are incidental to this inquiry. Their details will be omitted except where strictly necessary to explain an institutional mechanism.

The subject of this work is not the litigant.

It is the courts.

And the question is whether an institution that retains all the outward attributes of justice may nevertheless have ceased, in significant respects, to practice it.

VII. The Record: Two Countries, Two Judicial Systems

The preceding observations arise from ten years of proceedings before ten courts of law in France and the United States, two countries whose democratic institutions profess the rule of law, equality before the law, and equal access to justice.

The underlying disputes are deliberately omitted. Their merits are irrelevant to the institutional questions examined here.

What follows is a summary of the procedural events.

A. In France: The Same Dispute, With and Without an Attorney

1. The author of these lines was initially able to retain an attorney on credit and promptly prevailed.
2. He was subsequently sued again over the same underlying dispute.
3. By then, he could no longer afford an attorney, and, in addition, his application for legal aid was refused.
4. He lost the second proceeding, under the following circumstances:
    a. He had received no notice whatsoever of the date of trial.
    b. Consequently, he did not appear and was judged by default.
    c. The material presented as evidence was legally deficient and did not establish the plaintiff's claim.
    d. In particular, the plaintiff never established that he had actually paid the money he was demanding back.
    e. The author learned that the trial had taken place, and that he had lost, exactly three months after the event.

The same dispute. With an attorney, a prompt victory. Without one, an adverse judgment following a trial of which he had not even been informed.

B. In the United States: The Changing Financial Fortunes of the Litigants

1. Not long after the case was filed, he obtained professional representation, and his opponents suffered a relatively prompt defeat in

federal court.

2. When he could no longer afford counsel, his attorneys ceased arguing his affirmative defenses and counterclaims, so these were struck.

3. Following a jurisdictional reversal by the federal court of appeals, the litigation was remanded to state court.

4. The remand rested upon the asserted foreign citizenship of one plaintiff, an entity whose legal existence and capacity to participate in the litigation the author had repeatedly challenged.

5. The case then remained effectively dormant for approximately three years.

6. The plaintiffs later explained their inactivity by stating that they could not afford attorneys.

7. Once they could again finance legal representation, the proceedings were abruptly revived, in an accelerated mode.

8. Throughout the state-court proceedings, the author of these lines filed 202 pleadings, whose substantive arguments received, in effect, no judicial consideration.

9. The case eventually proceeded to trial under the following circumstances:

    a. He was physically unable to attend, residing 8,000 kilometers from the tribunal and without the wherewithal to travel.

    b. His request to participate electronically was refused because the

court considered such participation inconvenient.

c. At the pretrial hearing, as a direct consequence of his absence, his affirmative defenses and counterclaims were struck by default.

d. The trial proceeded in his absence.

e. He could not afford a court reporter. Consequently, no verbatim record of the trial exists.

f. The judgment was drafted by the plaintiffs and adopted by the court with approximately 99% of its original text unchanged.

g. The judgment relied predominantly upon a one-page pre-litigation demand letter asserting the very wrongdoing that the lawsuit was supposed to establish, thereby absurdly elevating a mere accusation into chief evidence of its own truth.

h. The other purported evidentiary foundation was a rudimentary half-page table of accounting figures prepared by a plaintiff's principal, and never communicated to the author of these pages during the seven-and-a-half-year litigation. He received it only months after trial.

i. On appeal, the absence of a trial transcript was invoked as an obstacle to reviewing the proceedings.

When his opponents could not afford attorneys, the proceedings waited for years. When he could not afford an attorney, the proceedings continued without him.

The reader may now return to the theoretical concession: "*Suppose, for the sake of argument, that the author of these lines was wrong about every substantive claim he made.*"

Would any of the foregoing become an acceptable administration of justice?

And if such proceedings can culminate in final, enforceable judgments, what remains of the substance that judicial form was originally intended to protect?

To provide one final perspective on the specifics of these cases, the author of this analysis submitted ream after ream of incontrovertible evidence, together with extensive demonstrations that the evidence advanced by his opponents was variously irrelevant, childishly illogical, sometimes grotesque, and, at times, simply fabricated.

But who would know, if none of it was read and its author was gagged?