

Book Review

Procedural Justice. By Michael D. Bayles. Dordrecht: Kluwer Academic Publishers, 1990.

1.

There are many evidentiary rules, e.g., the rule against hearsay and the general rule against allowing character evidence to show that the defendant acted in conformity thereto, that are procedurally dedicated to achieving justice. The same might be said about many of our constitutional guarantees, e.g., due process and equal protection rights. Moreover, Civil Law litigation is governed by the rules of civil procedure and criminal law prosecution is circumscribed by constitutional mandates to counsel and protections against self-incrimination. Each safeguard and procedural rule is designed to prevent unfair treatment while also allowing judicial freedom. Even professional ethical codes are imbued with procedural restrictions designed to circumvent injustice, e.g., restrictions not only on possible conflicts of interest, but also on *ex-parte* communications and overreaching within the agent-principal relationship.

What is essential to all of these rules and standards that renders them procedural and for what purpose are they to be applied? These are the questions that chiefly concern Professor M.D. Bayles in his smart little book *Procedural Justice*.

Professor Bayles trifurcates his book into synergistic parts. Part one covers the traditional requirement for procedural justice. Professor Bayles notes such fundamental prerequisites as: impartiality of the decision maker. This, in turn, is analyzed in terms of the decision maker being free of an interest in the outcome of the case, not being possessed of a bias toward or a prejudice against either side and being free of actual and possible conflicts of interest along with a more limited proscription against *ex-parte* communications. In addition to the fundamental, procedural requirements for justice, Professor Bayles notes that each party to civil litigation and each side in a criminal prosecution must be ensured the opportunity to be heard upon adequate notice. The process

of being heard requires the chance to present and rebut evidence, confront contrary parties, enjoy the benefit of counsel and the right of appeal. The last portion of Part one addresses the necessary dangers of adding flexibility to the above noted requirements. Judicial discretion, and analogical, judicial reasoning tempered by the principle of *stare decisis* (judicial consistency) are the final concerns of the first part.

Part two of Professor Bayles' intellectual analysis of procedural justice deals with the theoretical justification of those rules and standards traditionally required and referred to in Part one. According to Professor Bayles, the norm for evaluating the rules and standards for achieving procedural justice is not simply a utilitarian cost-benefit scale. The variables are cost and benefits of a practical and moral nature, e.g., reaching a correct and true appraisal of the facts and the approximate law, issues of timeliness, participation of relevant parties, social confidence in the procedures and equal treatment of the parties-fairness.

Part two ends with an analysis of the limits of the adversarial, judicial system and possible alternatives for purposes of adjudicating conflicts and nonconflicting issues. Such considerations as state action, deprivation, the possibility and cost of enforcement conjoined with judicial discretion all play, with differing degrees, in the evaluation of the various legal and ethical systems, e.g., adversary adjudication, bureaucratic investigation, directorship, professional service and negotiation.

Part three is devoted to the application of the fundamental requirements as presented in Part one and theoretically justified in Part two, to two areas of conflict-benefit resolutions, namely professional discipline and employment decisions. With respect to professional discipline, the theoretical requirements recommend the use of the adversary model with bureaucratic investigation at the preliminary stages. Guarding against possible conflicts of interest, is the chief danger to be negotiated.

As Professor Bayles notes, employment decisions constitute a more difficult challenge. Making distinctions between hiring, merit and promotion, demotion and termination, Professor Bayles notes the different theoretical values at play and the best procedural safeguards designed to respect those values.

2.

Professor Bayles' work seems clearly correct and that may be the chief problem with it. Part one is, in terms of material covered, very ambitious. And although there obtains some penetrating analysis and insightful conclusions, some of the issues in Part one are treated as obvious when, perhaps, they are not. Some issues are treated only glancingly, e.g., the procedural problems anent various burdens of persuasion, the hearsay rule, the topic of professional confidentiality, etc. All in all, Part one, if

occasionally too expansive, is satisfying yet neither exceedingly innovative nor pellucid. The least satisfying portion of Professor Bayles' work is Part two. This Part seems vague in part and underargued in part. From a careful reading, one is left with a clear understanding of what one perhaps already knew and a vague idea of what one did not know prior to the reading.

By far, the most intellectually exciting and fun portion of Professor Bayles work is Part three. The application of fruits of the prior two partsn to the issues of professional discipline is especially enjoyable. The application is innovative and lucid.

On balance, Professor Bayles' work is scholarly and frequently, quite exciting. It is without any difficulty to see that the procedural safeguards that are expressly provided for in, say, the civil law principle of *res judicata* (the principle that a party who has had a full opportunity to present a contention in court is denied permission to assert it on another occasion) or the *Dead Man's statute* (the principle that the declarant is deemed incompetent to testify concerning the decedent's oral promiser or declarations which usurp the decedent's estate in favor of the declarant) are covered by Professor Bayles's work, notwithstanding that neither principle is actually addressed by Professor Bayles.

However, Professor Bayles does not tell us why certain procedural rules are so very important in achieving justice. What are the philosophical arguments for that aspect of justice which Bayles' procedural safeguards are designed to achieve? Professor Bayles does not tell us how to weigh procedural requirements against the mandates of substantive law when there is conflict, e.g., the Fourth Amendment right against unreasonable search and seizure with the attendant exclusionary rule confronting incriminating evidence actually connected to the defendant. Nor does Professor Bayles help us discern the difference between substantive law and procedural rule inherent in such difficult cases as *Erie R.R. v Tompkins*, 304 U.S. 64 (1938) (the case that established the doctrine that federal courts are obliged to use the common and statutory law but not the procedural rules of the state in which they reside).

In all Professor Bayles' book elucidates what the procedural requirements are for justice without explaining what justice is nor how or why these procedural rules are deemed exactly to achieve justice beyond the intuitive appeal of the rational person.

Clifton Perry

Auburn University