

Lascher at Large  
By Edward L. Lascher  
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As these words are written, I'm immersed in a trial clear at the other end of the state, and I want to comment about a couple aspects now, before I know what the result turns out to be. (Yes, I said "trial". One thing that makes me unhappy with my appellate specialty is the fact that most appellate lawyers antiseptically seal themselves off from the trial courts – sometimes making me suspect they're terrified of the arena – and conversely trial people seem to think appellate advocates are just a subspecies of law professor. In point of fact, I think it improves one's perspective enormously to get close to where the raw material is being mined, and to see the witnesses sweating, the jurors reacting and all the rest. Although I believe in specialization in general, I don't doubt that lawyers in every specialty ought to get out periodically and see some of the forest around their trees – probate lawyers find out what a domestic relations court looks like, PI hot dogs try drafting contracts, and so forth. But I digress.)

A real pleasure of this particular trial is the reminder how nice things, people and life can be in a really small-town trial court, one that makes even little Ventura look pretty cosmopolitan – or at least trying to be. Then, too, a revelation is my first experience before a sightless judge. (I eschew use of the word "blind" because there are very few of us who haven't appeared before a blind judge, but most are blind in other ways.) The surprising thing is not that the judge is so effective and admirable; he is, but I had already heard that. What is more intriguing is how minimally this factor affects the trial. Within a day, jurors and counsel to whom this was all new found themselves paying no attention whatsoever. If anything, there seems to be a slight and perceptible (and most commendable) increase in the senses of responsibility, clarity and attention on the part of all hands, without any apparent effort in the process. All in all, a thought provoking experience.

### FEDERAL FUN

No, this time I am not going to gripe about the federal courts (although it should not be assumed therefrom that I have run out of material). Instead, I want to advert for a moment to the federal bar. Not the club that puts that name in capital letters, but rather a certain segment of our profession who thus describe themselves in neon letters, if not self-bestowed haloes. You know 'em, the bunch that look at you perplexedly when you say "Code of Civil Procedure" or something like that, and then eventually a light goes on: "Oh, you're talking about the state courts!" Or, of course, the ever popular clincher in an argument on procedure: "The way we do it in federal court . . .". (Funny, that doesn't seem to win many friends or influence many rulings, but the kind of folk who are devotees could care less. Image is far more important than outcome.

There are certain prominent characteristics of a federal barrister. One of them is that there is no such thing as a federal barrister, only teams of them. It takes a name partner, the head of a sub-department, one associate six years off the law review and with his eye firmly fixed on crossing the fateful line, one junior associate (the only one who's ever worked on the case or knows what it's about) and two paralegals – one to carry the interrogatories and the other to marshal the Lexis printouts – to move for a continuance. In that scene, it isn't a lawyer that tries a case; it's a detachment.

And they live for only two things: discovery and exhibits. Lordy, do they have exhibits! I think I'd rather resolve my disputes with trial by battle than trial by document. Sight unseen, I'd trade my annual income for the Xeroxing bill at Gibson, Dunn or Pillsbury or the like.

## DOWN WITH DIVERSITY?

How did all this come up? Well, to tell the truth, I was thinking about federal jurisdiction. And all I have to hear is the word “federal”<sup>1</sup> and I lapse into some such reverie. But what got me going this time is the great crusade being mounted nationwide to do away with diversity jurisdiction. It seems to emanate – as so many jolly things do nowadays – with silver-maned Warren Burger, but it’s in vogue among the legal intelligentsia at large.

The logic of the anti-diversity campaign is inexorable, if characteristic. The proponents point out that the federal courts are crowded and, by simply chucking the diversity-of-citizenship cases out, they can cut their load down by a quarter, or a third, or 98% or whatever.

Marvelous! What an ingenious cure for court congestion! There is just one little thing wrong. All the cases that are thrown out of the feds go somewhere else. “Oh, you mean the state courts? Really, old boy . . .”

Of course, here in California, we have counties in which the trial of a civil action is as extinct as the woolly mammoth but, what the heck, we can “solve” the overcrowding of their Lifetimeships by merely shoveling some more congestion onto the state system. Maybe we owe it to them. This is just sort of a reverse English version of the thing I keep reading in the papers about “federal matching funds”. Honest, there was an item in the local paper recently to the effect that one agency was facing a crisis: It hadn’t yet figured out a way to spend its matching funds and the deadline was breathing upon us. (As you might suspect, our representa- tives heroically met the challenge.) It’s nice to see the local folks treating federal grants as a way to accomplish something without spending tax money since, of course, few of us pay any taxes to Uncle Sam. Good grief!

## THERE ARE REASONS

But, anyway, back to diversity. I have a hunch that a lot of socio-racial tensions which afflict our society are not going to get much better until those segments who have held the short end of the stick for so long wind up as part of the entrepreneurial middle class. It may be as important, in attaining the kind of society I hope we all hope for, to find more black citizens successfully operating small chains of hardware stores and the like, and getting their own shot at a piece of the pie; more Chicanos opening Mazda dealerships, not just forming voting blocs. Sharing in the pursuit of happiness (in the declarational sense) seems as important as sharing the franchise. And I think that the guarantee of fair treatment in civil, economic relations with the law may in its own way be just as vital as protection of civil rights in the long term.

Given that feeling, I can see a lot of good reason for keeping access open to the federal tribunals where citizens of different states can take their conflicts over livelihoods and the fulfillment of their dreams. Denying that safety valve seems pretty cynical to me on its face. When you consider that abolishing diversity jurisdiction wouldn’t do any substantive good, anyway – it would just be an exercise in burden-shifting – I become almost suspicious as to the motivations of those who are pushing it. “We can’t have too many of them in our exclusive club, or it won’t be exclusive any more, doncha know.”

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<sup>1</sup> Every one of these columns seems to have some little quirk; this time it’s putting words in quotes. I wish I knew why I do this kind of thing. But I digress.

## The Criminal Process Revisited

A judge friend of mine in another part of the state was telling me something interesting. (Yes, Virginia, I do have friends who are judges. Yes, judges do say interesting things.) He is presiding over his first death penalty case and is a person philosophically opposed to the death penalty. It is making him very uncomfortable, but that is not the story.

What caught my attention was a concern he had. Because of his feelings, he is going far beyond his usual degree of intense conscientiousness – and he’s a damn conscientious judge on any case – to make absolutely, beyond the slightest doubt, sure that every ruling is utterly right, every opportunity extended, every precaution invoked. It is going to be the first absolutely perfect, error-free trial in this country’s history.

And that, he points out, is exactly the problem. He’s beginning to worry that he will be the first judge ever to try such a perfect death penalty case the defendant won’t have thing number one to argue on appeal if he gets convicted. His honor is afraid that he may be, in effect, greasing the skids by being “too good” a judge.

I feel great sympathy for my friend. It must be a terribly unnerving thing to realize that the better you perform your function, the more likely it may be that society will kill somebody. But, on the other hand, I have seldom heard quite such a stinging indictment of our criminal justice system. The irrelevance of guilt and the trivialization of due process has seldom been as starkly pictured to me. I don’t know the solution, but this sure points out the problem.

### APPELLATE ANTICS

Speaking of points to be raised on appeal, did any of you catch People v. Wende? That’s the one in which our Supremes say that, where the convicted defendant appeals and competent counsel makes a diligent effort and can only come up with a specification of the appellant’s claims, a Los Angeles Anders v. California, it’s up to the appellate court to do its own independent job of seeing if they can figure out an argument to be made for the appellant.

Now, don’t get me wrong: I think appellate representation of indigents was long one of the greatest shames of our process, particularly back in the days when there were few surer ways of antagonizing an appellate court than by actually making a good argument if you were appointed counsel. And the appellate judiciary were mincingly tolerant of appointed counsel who dogged their responsibilities. These were horrors, but they seem to be fading somewhat into the past – largely, although by no means entirely, because of the adoption of a State Public Defender.

Given competent and vigorous representation, however (and bearing in mind that I think that should not be just given but guaranteed), it seems to me somebody has the algebra way out of shape when a court has an obligation to become advocate. I somehow have this interesting vision of a dialogue at the weekly conference on whether to affirm or reverse a conviction:

“Although the appellant and his counsel weren’t able to come up with any plausible argument I, Justice Jones, in my capacity as para-advocate, have come up with Argument 23(b) and, would you believe it, I find myself persuaded by my argument.”

There are strange things done, ‘neath the midnight sun – and not only by miners who toil for gold,

either.

## TENURE OR NOT TENURE

Our fine feathered federal friends seem to be a lot on my mind this month. (I hasten to add that the trial I mentioned is in state court – if you remember what that is.) When I was a boy, I thought as a boy and so, when in law school and other forms of tadship, I thought the idea of life tenure for judges was the greatest thing since Solomon put away his sword. Now, I'm not anywhere near as sure; fact is, I'm not sure at all.

Still, there was a thought-provoking sentence in a worthwhile article by Chief Judge Irving R. Kaufman ("Chilling Judicial Independence" (1979) 88 Yale Law Journal 681, 715): "Our judicial system can better survive the much discussed but rarely existent senile or inebriate judge than it can withstand the loss of judicial independence that would ensue if removal of judges could be effected by a procedure too facile or a standard too malleable." Not bad. For a federal judge to recognize (as he does) that there are some bases and potential procedures for removal is a great leap forward, and he's quite right in saying that too easy a standard just makes for the imposition of more lockstep.

We need individuality on the bench and I must grant that the line between that and psycho-eccentricity is usually too hard to draw – and therefore shouldn't be drawn. Of course, I don't agree for a moment that the senile judge is "rarely existent", nor do I think either he or the inebriate one is the real problem; it is the dangerous megalomaniac who knows not the restraints of peer pressure that bridle most of us. But we probably have to suffer those slings and arrows as the price of avoiding computerized justice; if anything, we seem to be tending too far in that direction already.

## PARTING SHOTS

I have been griping at our Supreme Court so much lately that I'm afraid it conceals my feeling for just what a neat bunch they are, for all their troubles. (I suspect there are those among their tormentors who outrank me, however; a guy named Babich comes readily to mind.) And, by pure coincidence, Justice Mosk has gotten the particular brunt of my discontent. Bearing that in mind, I commend to your attention his opinion in Marriage of Carney (24 Cal.3d 725). It is, in many ways, my idea of precisely what an appellate opinion should be. No, make that in every way. . . . I see that State Bar vice president Joe Hurley (Letters to the Editor, October, page 363) is unhappy over the fact that this is an "unrestricted column". Uh, Joe, that's the nature of an opinion feature in a periodical. This is neither intended, nor does it turn out to be, a press release from the Congregation for the Propagation of the Faith. Of all people, Joe surprises me in his belief that we should all be in lockstep. . . . Just to prove that I'm not, I'd like to invite the attention of any of you who missed it to the recent report that the staff of this club, having desperately invoked our emergency cooperation to insure that it didn't get a huge dues cut, promptly began planning a pay increase for its inner circle of executives – retroactive, mind you, to before the dues crisis hit. Anybody ever hear about credibility? Anybody ever give any thought to crying "Wolf"? Ah, so . . .