DUE PROCESS AND THE LAY JUDGE

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Doris Marie Provine. *Judging Credentials: Nonlawyer Judges and the Politics of Professionalism*. (Chicago: University of Chicago Press, 1986). xviii + 248 pp. Notes, appendices, index. $30.00, $13.95 (paper).

The prevailing force tugging at the American judiciary, the federal as much as the state, is the dynamic tension between judicial independence and democratic accountability, or the rule of law versus majoritarian democracy (White, 1976: 2). Most often the struggle between these two antithetic but desirable conditions is fought over the proper system by which judges should be selected (Lovrich and Sheldon, 1985: 276). Should judges be held accountable by periodic partisan elections, or should they be appointed by chief executives for life terms? However, the tension between the rule of law and democracy finds expression in other aspects of judicial politics as well. It is to another aspect, rarely researched, that Doris Marie Provine turns her attention in *Judging Credentials.*

Throughout the history of the American republic confrontations were common between those who had argued that a nonlawyer judiciary threatens the integrity and independence of the law and those who had maintained that lay persons on courts keep the judiciary closer and thus more accountable to the people. Early in our history, the argument for lay judges, at least on the state trial benches, was convincing. The paucity of attorneys, the bad name associated with courts and lawyers during colonial times, and the agrarian society (perpetuated by the frontier as it moved West) dictated that lay persons be involved in judging (Wunder, 1979). On the frontier, federal territorial judges imposed by a faraway government were distrusted by the inhabitants; in addition, the justices of the peace were often the only adjudicators readily available (Hall, 1981; Sheldon, 1987). But circumstances were changing, thus prompting the legal profession to advocate lawyer judges at all levels of the judiciary.

Provine suggests that as laws became more numerous and complicated, a consensus developed for the need for experts to apply those laws. With the passing of the agrarian society, commercial cases involving complicated issues and considerable sums of money came before the courts (Horwitz, 1977: 140). Too much was

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at stake to leave resolutions to those untrained in the law. Also, common law decision making afforded judges the opportunity to influence if not make public policy, drawing ambitious attorneys to the state and federal benches (Nelson, 1975: 173; Horwitz, 1977: 2). The English heritage of the Inns of Court and the prestigious barrister class, which comprised the judiciary, added to the attraction of the bench. Also, lawyer-legislators were in a position to shape judicial structures and qualifications in their own image. However, according to Provine, the most important factor supporting the argument for a bench populated by those trained in the law was the commitment to a governmental system of separation of powers. The theory dictated an independent judiciary. Such independence could best be assured by a professional judiciary drawn from the lawyer class.

As Provine fails to note, however, it is perhaps the merger of the above trends with the age of formalism in the law that best explains the movement to replace lay persons on the benches with lawyers. Formalism viewed law as a scientific, objective, and self-contained or autonomous body of rules. According to Horwitz (1977: 257), "the attempt to place law under the banner of 'science' was designed to separate politics from law, subjectivity from objectivity, and layman's reasoning from professional reasoning." Certainly those untrained in the law could not comprehend its intricacies, let alone apply them in disputes brought to the courts. The replacement of the clerking apprentice system by formal training in a law school, the Langdellian revolution in legal education, and the formation of the American Bar Association and state counterparts all contributed to the perceived need for lawyer judges (Stevens, 1983: 51; Friedman, 1984: 244). Of course, in very recent times the increase in the number of law graduates creates demands for jobs where even the low-paying, part-time spots on the lower state judiciary appear attractive. All of these trends did not, of course, happen simultaneously, but they reinforced each other, bringing stronger demands for an all-lawyer judiciary. It is what Provine might characterize as the increasing convergence of adjudication and professionalism.

The "professionals" appear to have won, but at what cost? It is to this cost that Provine has turned her expert attention. She is an attorney, served as a judge of a court of limited jurisdiction in upstate New York, and is a political scientist of note. Simply stated, her question is: Does being a lawyer make a difference for judges in courts of limited jurisdiction? Her conclusion is that nonlawyer judges have been given a bum rap, that the political system is the worse for it, and that little will be done about it (p. xvi).

Provine arrived at this frustrating conclusion after surveying 1,647 nonlawyer and 575 lawyer judges in New York State and then observing and interviewing 26 town and village judges evenly

divided between lawyers and lay persons.[1] The focus of her survey was to ascertain the due process practices of the judges and to accumulate information on the nature of discretion exercised by those who preside over disputes that often involve neighbors and friends. Critics had persistently argued that lay judges fail to understand and thus are unable to apply due process standards in their courtrooms. Also, it was said that their exercise of discretion is likely to be inconsistent and based often on extralegal factors. But judges who are products of formal legal training would largely avoid such abuses. Not so, argues Provine (p. 120):

> Critics of law judges will find little support for their position. . . . The survey and fieldwork . . . failed to expose any major differences between lay and lawyer judges in attitudes or behavior. Other published evidence is consistent. None of it supports the charge that nonlawyers are unable or unwilling to adhere to due process standards, or less likely to be fair in the exercise of discretion.

Sensitivity toward due process standards was measured by comparisons between lawyer and nonlawyer responses to questions on bail setting, motions to dismiss charges, plea bargaining, and sentencing and by observations and interviews. When differences arose, they often were in the opposite direction critics of lay judges predicted. For example, it was thought that prosecutors would be overgenerous with bargained pleas in order to avoid a mistake-prone jury trial before a lay judge. Actually, jury trials are more frequent in the lay courts. Nonlawyers do not impose bail to any significant degree more than lawyer judges. Nor do they, to any significant degree, impose tougher sentences than their lawyer counterparts when the guilty party has pleaded not guilty, thus necessitating a trial. Lay judges do tend to look more favorably upon the prosecution and police, a slight difference that Provine attributes to the environment of the courts. Both the survey results and her field observations, which appeared somewhat unsystematic for a political scientist but certainly appropriate for an attorney and former judge with firsthand experience, led to the conclusion that those few differences between the lay and lawyer judges seem to "be a function, not of the lack of legal expertise but of judicial characteristics unrelated to training and expertise as a lawyer . . . " (p. 103).

Small claims hearings and sentencing proceedings provided the test for the contention that lay judges would tend to abuse their exercise of discretion. Small claims hearings for the lay judges are said to be too informal and final decisions are said to be too flexible. Again, Provine found little evidence to support these claims. Only one major difference was discernible between the

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[1] The study was supported by the Law and Social Sciences Program of the National Science Foundation and by Syracuse University.

two groups of judges in the exercise of discretion in sentencing: Lawyers tended to consider more factors in the sentencing decision than the nonlawyers. Nonetheless, the "survey evidence clearly does not support the charge that lay judges typically exercise discretion with less consistency and even-handedness than lawyers" (p. 111). Her results might have been strengthened had she surveyed lawyers who practice before these courts, as well as jurors and parties to the disputes. However, being an "expert witness" as an attorney and former judge aids her observations.

Provine is on solid ground with her descriptions of the environmental differences between lawyer and lay courts. The lay courts are almost exclusively in villages and towns, while the lawyer courts are mostly located in populated areas. This rural-urban dichotomy appears to account for more of the differences between the images of courts of limited jurisdiction than does the lay-lawyer contrast. Thus, reform of these courts should be directed toward improving the lot of the village courts, quite apart from the legal training of the presiding judge. In place of dignified quarters in appropriate courthouses, village justices have to contend with holding court under makeshift conditions in schoolrooms, churches, or town barns. They have little in the way of support staff. Their pay, dependent upon local coffers, is abysmal. Cases are routine, unchallenging, and insignificant. Their public image, certainly outside their jurisdictions, is questionable, and among the legal profession they tend to be subjects of disrespect and ridicule. The few lawyers that serve on these benches have to contend with similar conditions and often similar images. However, as Provine obviously regrets, reform will most likely come with more lawyers being placed on these benches rather than improving the environment.

The irony is that "while [Americans] venerate rule by democratically established law as the foundation of our political traditions, we are uncomfortable with democracy in adjudication" (p. xvii). While buying the legal profession's arguments for an all-lawyer judiciary, Americans have lost another bit of democracy. Perhaps some democratic accountability can be salvaged. An answer may lie with how these lawyer-judges are selected, perhaps selecting through democratic and open means and allowing those chosen to go about their legal ways with the understanding that at some point they must again explain what they have done to or for us in order to remain in their posts.

Provine's study needs to be replicated in other jurisdictions.[2] Students of the judiciary (and the judiciary itself) must be reminded of the need to balance democracy with the rule of law.

[2] Provine has provided ample instructions, including an appendix with her survey form, to keep a number of M.A. or Ph.D. students busy collecting meaningful comparative data.

What is unfortunate is that the legal profession will largely ignore the results of such studies.

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