

# University of Missouri Bulletin Law Series

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Volume 32 April 1925

Article 7

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1925

## Bar Bulletin

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### Recommended Citation

*Bar Bulletin*, 32 Bulletin Law Series. (1925)

Available at: <https://scholarship.law.missouri.edu/lr/vol32/iss1/7>

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# BAR BULLETIN

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OFFICIAL PUBLICATION OF MISSOURI BAR ASSOCIATION

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NATURE OF JUDICIAL PROCESS.—Courts are not infallible. Nor is the law, as was formerly considered, the emanation of pure reason. It is a process, an evolution, growing out of the demands and needs of a constantly changing and developing social order. It at all times presents the paradox of requiring both stability and change in order to function properly. To give it effect in this dual aspect under the limitations imposed upon them is the difficult role of the courts. It is much easier to maintain the stability of the law, its uniformity and certainty, which may be done by merely following established precedents, than it is to respond to the insistent demands of changed conditions, which may require an entirely new application of old principles, or a complete abandonment of what has become archaic. Oftentimes just plain inertia makes it difficult to leave the beaten path. When therefore a rule of procedure which has long been accepted and followed is suddenly assailed by "clamor or otherwise," as operating to defeat the essential interests of society, a court may well take pause and consider whether there should be a re-examination and a reappraisal of the grounds upon which the rule rests. —Ragland, J., concurring in *State ex rel. Meininger v. Breuer*, 264 S. W. 1.

The answer to these questions, so far as there is an answer, brings us face to face with fundamentals, with one of those ultimate contradictions that taunt us at the end of so many quests for truth. Law must be fixed; yet it must move. Law must be stable; yet it must be adaptable. It must be certain; and yet it must serve a world of uncertainty. It must be uniform for justice's sake; yet it must often be individualized for justice's sake. If it be not reasonably subject to prediction, then it is not useful; if it lack the vital power of growth, then it is worse than useless.

Such is the duality of the nature of law, its baffling secret and its principle of life.

—Inaugural address of Huger W. Jervey,  
Dean Columbia Law School.

PROCEDURAL DEFECTS<sup>1</sup>

*The article that follows was a letter written to the editor of the St. Louis Globe-Democrat after a jury in St. Louis had acquitted one Motlow. It is an excellent treatment of two fundamental defects in our procedure.—Ed.*

Your leading editorial in today's paper was prompted by the verdict of the jury in the Motlow case. It deplores the continually recurring miscarriage of justice and the resulting lack of confidence which the public has in the efficiency of our judicial methods. I believe your editorial reflects public thought on this subject. I believe, too, that the present unusual prevalence of crime is caused partly by diminished respect for the law and a greatly diminished fear of punishment.

You have pointed out in a general way some of the causes which contribute to these failures of justice. I desire to make a specific suggestion which may be of some value to those who are seeking a remedy for present conditions.

When this subject is under discussion by newspapers and others who do not directly participate in the trial of criminal causes, the result is a general condemnation of the "technicalities of the law." With these technicalities I have no more patience than is shown by the public generally. But it is significant that technicalities played no important part in the verdict of acquittal in the Motlow case. Coincident with the Motlow case the papers also carried a report of the acquittal of a woman charged with the killing of a man, and, so far as appears, the verdict of acquittal in that case was not influenced by any "technicalities" of the law.

In both these cases the decision of the jury was squarely upon the merits of the controversy. If these decisions were wrong, they were not due to technicalities, but to the fact that the juries were persuaded to a wrong conclusion. That juries are continually influenced to reach wrong conclusions through appeals to prejudice and passion and to sympathy, and through consideration of facts entirely foreign to the questions involved, is known to every active practising lawyer.

This knowledge has led many liberal-minded lawyers to believe that the jury system is a failure. This belief is held not only as to juries in criminal cases, but as to juries also in civil cases. But the jury system is here to stay. It is guaranteed by our Constitutions, and, moreover, is firmly implanted in the political thought of our people. If improvement is to be made, it will be through the adoption of some system which includes it as the most important part thereof.

The defect in the jury system in Missouri, as I view it, lies in the fact that under our system the jury in the trial of a case is left to the tender mercy of opposing lawyers, who pull and haul at it with very little restraint from the court. The jury can get no real guidance or help from the Judge. Jurors, as a rule, are inexperienced in the matters with which they have to deal. They are taken from their respective occupations, with which they are familiar, and are placed in unusual and unfamiliar surroundings, where a calm and quiet judgment is often impossible. The Judge makes rulings on technical questions of law, some of which the jurors understand, and some of which they do not understand. The Judge is no real participator in the proceedings. He is not much more than a policeman in plain clothes to preserve order. He is debarred

from indicating his opinion upon any question of fact. He cannot indicate his opinion of the testimony of a witness, however corrupt or unbelievable the witness may be.

The judge is presumed to be impartial. He is assumed to know the applicable law. He has usually had a long experience in sifting out the truth from the untruth and the important from the unimportant. He is peculiarly qualified to decide questions of law and of fact. Yet, under our jury system, his learning and experience counts practically for nothing. The jury cannot look to him for any real guidance. If they are bewildered by the clamor of the attorneys and the conflicting testimony of honest or dishonest witnesses, they are left to their own resources without any help from any one person participating in the trial, who is both impartial and experienced, and who can have other motive than to see the right prevail and the wrong defeated. Under our system this important help which the judge could give to the jury in a purely advisory way is denied to them. He cannot indicate his views as to the merits or demerits of the controversy. And when he comes to explaining to the jury the law that they should understand in reaching a verdict, the procedure is grotesque when not tragic. Under our state laws the judge is required to give his "instructions" in writing. These instructions are usually written by the lawyers and edited by the judge. They have come to be so cryptic that few can understand them. They are usually read to the jury by the judge in such a way that they are not only unimpressive but unintelligible. Instead of the judge being permitted to talk to the jury in plain everyday common-sense English, with explanations as to the meaning and purposes of the law and its application to the facts under consideration, the judge is, by our antiquated system, tied down to giving the law under ancient formulas, so abbreviated and so phrased as not to be understandable.

In the federal courts it is different. There the judge is a real participator in the trial of the cause. He exercises a greater control over the lawyers and litigants and over the jury, and is held in much greater respect. He explains the law orally to the jury. He is at liberty to comment upon the facts. He is thus permitted to be of a real help to the jury. The result, as every lawyer knows is a much greater celerity in the trial of causes and a much nearer approach to just decisions.

It is common knowledge among those who deal with the criminal classes that they stand in greater fear of the federal laws and federal courts than of the state laws and state courts. The result has been that many criminals restrain themselves from violating the federal laws, while they constantly take their chances with violating state laws. That the federal courts and federal prosecutors are more uniformly successful in punishing the criminally inclined is evident to anyone who reads the papers and notes the important cases, some of which are of quite recent conclusion.

The point I am trying to make is, that if we are to preserve the jury system, we should liberalize our rules of procedure, both criminal and civil, to the end that the judges of the courts should be assigned a more important part in the trial of a cause. If this can be accomplished there will be fewer miscarriages of justice. If the judge is given greater responsibility and greater power, the public will hold him responsible along with the juries for the results, and if unfit judges are chosen, the remedy will be in the hands of the people through the ballot.

St. Louis, Mo.

CHARLES A. HOUTS

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1924-1925

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