

April 1984

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### Recommended Citation

D. N. Kaiser, *Just Justice: A Reply to Mr. McConnell*, 60 Chi.-Kent L. Rev. 215 (1984).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol60/iss2/5>

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## JUST JUSTICE: A REPLY TO MR. McCONNELL

D. NOLAN KAISER

When institutional practices are subjected to criticism from the perspective of a different tradition there is a tendency for practitioners to invoke in its defense highly visible principles and technical expertise integral to the institutional practice. Law is no exception. Footnotes may document the technical basis of the legal practice in question, but it is not its legal existence, it is its moral coherence which is called into question. Again, little progress can be had when we are invited to choose between conventional beliefs exhibiting blindness about blindness, and a basic constitutional right.

I will indicate five areas where Mr. McConnell's arguments fail and provide reasons for some of these failures. I will close with a position statement that places the controversy in moral and legal perspective.

### ENSHRINING A MISCONCEPTION

"No man can see with another's eye, no more can a man conclude with another's understanding or reasoning." It is true that I do not see with your eye, nor reason to conclusion with your faculty of reasoning. It is false to say that I cannot understand and accredit what you report having seen. This does not mean that I cannot understand what you report understanding, nor that I cannot reason to conclusion on premises supplied by your reasoning. In the first sense these words are true but trivial, and no one would think it important to dispute them. In the second sense they are false, though their failure is informative. Vaughn and McConnell have confused the true statement: "One who cannot see does not know by seeing" with: "One who does not see what others know by seeing does not know that thing." A misconception is not given greater believability because it is articulated by a chief justice. The presumption that it does colors nearly everything that follows in Mr. McConnell's review.

### ALLEGATION OF CONFUSION CONFIRMS IT

McConnell draws the distinction between the litigant's right to trial by jury and the mythic right of individuals to sit on a jury. He

says that I have confused these two rights, only one of which is recognized at law, and he pushes this theme in variation. True, I complain about legal practice which systematically denies blind persons an opportunity to serve as jurors and he reminds me: "It is only the litigants, not prospective jurors, who may complain about the exclusion of a particular person or class of persons from jury service." He confuses my prescriptive statements about the law for a descriptive statement of the law. I do not force blind jurors on litigants who would not have them. The belief that I do misses my position and so the program of my paper.

### THE LOGIC OF THE RIGHT TO JURY TRIAL

In Michigan as in other state jurisdictions, when the law summons blind persons as prospective jurors, the law recognizes them as *prima facie* qualified for jury duty. It remains for examination in *voir dire* to determine actual qualifications for the particular case being litigated. Because the logical corollary of a litigant's right to challenge is the right not to challenge, litigants have the right to claim those jurors they have not challenged. It follows that a full statement of the esteemed right to jury trial can encompass jury duty for blind persons.

### RETENTION AND DELIBERATION

From the fact that persons accustomed to both seeing and hearing do not retain as much of the information as they normally would when one of the avenues of perceptual information is blocked only tells us about the fall-off in retention rates among normal persons who have been experimentally handicapped. It tells us nothing valid about retention rates among blind or deaf persons who are accustomed to their handicapped manner of information gathering.

In deliberation, jurors provide evidence missed or forgotten; through argument they increase or decrease the weight that a particular piece of evidence commands; they draw parallels and interconnections and so persuade or dissuade each other at various points and on various issues. This milieu of information exchange conjoined with access to exhibits and needed parts of the trial transcript makes available all the competent evidence upon which independent judgment and just verdict must rest. In this information-rich environment it is as reasonable to believe that a blind person can acquit his juror duties as it is that a blind person can acquit his judicial duties. Perceptual limitation

must not be confused with absolute data deprivation or conceptual incompetence.

#### THE BLIND JUDGE ARGUMENT MISCONSTRUED

Some, like Emerson, may think that enslavement to consistency is the hobgoblin of little minds, but lawyers and logicians know better. If the judge be blind and assigned to the case and the litigants waive their right to trial by jury, is there any coherent doubt remaining that the law accepts blind triers of fact? Since the judge's knowledge of law presumptively is of no effect in his "reasoning to finding" on the facts, consistency demands the legal possibility of blind lay jurors.

Between the legal duty to serve in the armed forces during national emergency and the legal duty to pay a tax liability, there is the intermediate area of jury duty over which there is genuine controversy. In many states, legislators have attempted to resolve the controversy by statutory enactment. In other jurisdictions jury commissioners or similar court officials have modified rules which previously excluded blind or deaf persons from jury duty. Many legislators and a growing number of court officials, including judges, share my view that absent convincing arguments by litigants in *voir dire*, blind and other perceptually handicapped persons may be seated on juries. Such jurors do not pose a generic threat to a litigant's constitutional right to swift and public trial by an impartial jury. If any litigant continues to think so in a particular case, his right to peremptory challenge remains to defend both his belief and his interest. Amending legal practice in the way I suggest breaks down one more barrier to a full and active civic role for such persons. It is a desirable policy goal, but even more, it is the recognition of a perceptually handicapped person's right to equal consideration in the society. In honoring this principle we satisfy one of the requirements of social justice.

