ON LOCATING VALUES IN JUDICIAL INFERENCE

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By values or value-judgments I shall mean here primarily judgments of what is good, worthwhile, or desirable. In legal matters, the question of value judgments concerns, in effect, the adoption of social policies or decision along the lines indicated by them. In traditional accounts of judicial inference — construed as the process of reasoning by which the judge reaches a justifiable decision — it has often been maintained that value-judgments can only constitute an unwarranted intrusion. The judge's business is to declare, not to make the law. (Such arguments rise to critical proportions when a social crisis is imminent and the courts are praised or blamed for their role — as for example in the United States when in the 1930's a conservative Supreme Court majority held back the New Deal, or in the 1950's when a liberal majority precipitated a dynamic thrust for racial integration in schools.) It is assumed that the only justifiable way for values to enter judicial inference is in premises or legal conceptions or directives that come from the basic law or constitution (including the established character of the judge's role) or through legislation. A judicial inference that inserted premises about the country's need or engaged in subtle utilitarianisms would be engaged in normative trespass. For example, a court that decided to cut down constitutionally guaranteed freedom of speech because the country was at war and so national security should be placed higher in the social purpose scale would, in the absence of special restrictive legislation, be going beyond its appropriate role. (Compare the Frankfurter decision in the Jehovah Witness flag-salute case, at the beginning of World War II (1) and the court's subsequent reversal of this.)

This brief picture of the traditional view needs little comment. Legislatures are constantly changing laws or introducing new ones to give effect to social purposes. Legal concepts, such

as theft or trespass, do embody a special valuation (of private property). Constitutions and legal systems do embody the broad purposes of peace, order, and particular conceptions of justice, that are taken to give a coherence to the law. That values enter into the character of the judicial process itself may best be seen either in comparing different legal systems (for example, the French emphasis on inference from the code as against the British use of precedent in the common law) or even better, at points where a call arises for changes in the role of the judge. Take, for example, the movement in legal philosophy in the early decades of our century that called for greater freedom in judicial decision (freie Rechtsfindung) ([2]). In effect, it rested on the recognition that industrialization was bringing innumerable problems into all branches of law, that social needs were rapidly changing, that current methods of judicial decision imposed too great a rigidity, that the judges immersed in the detail of application in concrete cases were in an excellent position to sense the needs and new directions, and that older methods of judicial decision should be relaxed to give them greater scope. Now many parts of this picture rest on factual assumptions, such as the degree of rapidity of change, the capabilities of judges to sense the new rather than to be typically encrustations of the old. But penetrating it all are the values of new forms of life coming into being, and the call on the law to help solve the problems generated, not to side with the old against the new. If we grant this fact-value configuration, then the values do exert an influence on the character of the judicial process. Of course the specification of the character of that process may itself be a matter of constitution or of legislation, or an informal matter of the causal influence of growing social purposes. A similar perennial issue is the debate over the merits and demerits of *stare decisis*. Concepts of "revolutionary legality" may call on the judge to decide in the light of the changed purposes of the revolution. So too a rapidly changing society might conceivably decide to give a maximum ten-year weight to precedents, forbidding them to be cited thereafter. In all such cases, values have a meta-theoretical role on the nature of the judicial process.

In spite of the traditional picture, it is recognized that sometimes the work of the law becomes so complex that the value-neutral character of the courts is strained to the limit. The judges seem in danger of turning into administrators setting social policy in detailed application. When this happens, it may still be possible to restore the traditional picture by, as it were, diverting the value pressure from the judicial to the legislative or executive branches of government. For example, one might regularize the judicial referal of large-scale policy decision to legislative commissions in institutional form. More often, the question is argued out (in the United States Supreme Court) in terms of the doctrine of judicial self-restraint. For administrative diversion of social value pressures when demands for change and the complexity of detail become overwhelming, there is the whole development of administrative law. The judicial process is thus left to operate within its traditional modes of inference ([3]). But of course the question of modes of inference in administrative law then arise. Thus the procedure of an administrative hearing would have to decide how far it was to employ a juridical model and how far it was frankly to operate with a means-end or teleological mode.

In all these cases we have worked within the dominant traditional picture which keeps judicial inference relatively value-free. There is however a deviant tradition which is more sceptical about the value-aseptic character of judicial inference. It may pinpoint the place of values in two different ways. One is to assign them a limited role as an exceptional or occasional resort in the method of reaching a justifiable decision. The other claims for values a pervasive internal role which is necessary and unavoidable: no model of judicial inference is complete unless it has a place for value- variables.

As an example of the first, take Cardozo's exploration of the judicial process. He distinguishes several methods: the method of philosophy which engages in the analysis of cases with logical criteria, the method of history which traces an evolutionary development, the method of tradition which appeals to custom, and the method of sociology, which in effect uses conceptions of social welfare ([4]). The method of sociology, in-

herently value-laden, is employed where the others are insufficient and leave gaps. The outcome would then be the maxim for a model of judicial inference: if nothing else works, go in for direct value judgment.

An excellent example of the second alternative is the position proposed by Wurzel in the early part of the century that a category of *projection* be recognized as constitutive in judicial inference alongside of the more traditional logical ideas of subsumption and analogy ([5]). Wurzel's concept seems intended to be of the same logical type as subsumption and analogy. He says: "The process by which the concept is applied to the boundary case is not one of analysis, of separating the component parts of the concept and seeing which of the parts covers the case, but one of synthesis, by connecting the original concept with a new phenomenon and extending the concept so as to cover the latter". And again, "Projection is the extension of a concept found in formulated law to phenomena which were not originally contained in the concept, or at least were not demonstrably a part of the group of images forming the concept, without at the same time changing the nature of the concept as such". The connecting link in such a process is an experience or a state of feeling. The experience may be of economic and technological changes or a consciousness of injuries brought about in new ways, and the feelings may be values (e.g., familial) that steer the interpretation of a concept in one direction rather than another. That psychological elements enter into the process does not mean that Wurzel is guilty of "psychologism". Psychological elements enter into subsumption and analogy too — consciousness of an instance and grasping of a similarity. We can distinguish between the two aspects: recognizing the place of values *in* an adequate model of judicial inference, and offering psychological or economic hypotheses about the sources of the substitution-instances for the value variable.

The program posed by this possibility is to work out a model of judicial inference which will (ideally) show all the points at which, if no values are inserted, no definite decision will be reached. These are the points of choice where going ahead in

the process will be held up unless we move one way or the other, and the way we move reflects a value-selection. If we follow traditional analysis of the constituent processes in judicial inference the points of selection in the model may be identified as follows (6).

Structuring the case. The problem in human behavior and relations that generated the legal case has to be brought within the ambit of the legal system. It has to be routed to some broad dimension of familiar problems, e.g., violation of contract, criminal offense, disputed ownership. This selection, carried out by instigators and hammered into shape in pre-trial procedures, is equivalent to seeing the situation under a given description, and it is clearly geared to the practical aim of steering the case into the direction most likely to bring a particular result. For example, in the 1930's, when workers stopped work but stayed at their places in the factory day and night until their grievances should be settled, was this to be seen as a form of strike ("sit-down") in the field of labor law, or as trespass in connection with property law, or as running an inn without a licence and so going counter to municipal ordinance ? That the trespass description was dominant, expressed the traditional value emphasis on property rights. The treatment as a novel form of strike took chiefly a moral and sociological turn (e.g., that such strikes provoked less violence than picketing, or were more effective). The invocation of the municipal ordinance came only as a hasty effort to grasp a handy weapon.

Finding the law. Once the general description is clear and the case structured, what specific law is relevant ? The selection among possibilities is often value-laden. This is clearest where there is no ready law to hand, and analogies are invoked. There are, of course, competing analogies, and the choice is guided by its anticipated results. To mention familiar historical examples, will it be one that extends the range of compensation for accidents or restricts it, and similarly for accidents due to defective industrial products ? Or a contemporary example in the making: will it extend responsibility for industrial pollution, or limit it ?

Interpreting the law. It would be carrying coals to Newcastle

to repeat the familiar story of the way in which judicial interpretation of the meaning of terms — Wurzel goes into grammatical and systematic and historical interpretation — carries whole social philosophies (as in the American experience with "due process" or "liberty") that in a particular age shape the distribution of wealth and resources (principles of distributive justice), the extent of burdens, the range of opportunities, and so on.

Applying the law. It is also well known that applying the law to given facts of the case often involves value-judgments, e.g., about what is reasonable behavior or reasonable caution or limits of trust. Such judgments are setting standards for desirable human attitudes.

Reaching a decision. After all the previous phases there is still the actual putting together in a decision. Here the comparative weight of different factors is a value problem. And the very pattern of the decision mode is, as we saw above, an implicit value-judgment about how a judge ought to decide. The law of evidence itself could well be studied for pinpointing the embedded values. So too the general attitude to the legal struggle as a whole — to take extreme formulations, whether it embodies opposing scientific hypotheses to be judged or a ceremonial duel whose rules of combat are to be maintained — itself is laden with large-scale value orientations.

We have thus essentially three positions about the place of values in judicial inference. One is a model which keeps them out, except as initially given in one of the several ways listed above. The second is a model of the method of decision which gives values a separate and limited place. The third, explored in greater detail, furnishes a pervasive role. Is it possible, at this late date in the 20th century history of controversy about the place of values in judicial inference to adjudicate among these possibilities ? I think it is, and I think that a full treatment could show how some of the older difficulties and objections to a recognition of the place of values have been dissolved by philosophical developments on the relation of fact

and value, the relation of formal schemes and their interpretation, the relation of pragmatic to other elements in semiotic, the relation of context to content of ideas, and other advances that have relaxed traditional dogmatisms and over-sharp conceptual cuts. Obviously this is not the occasion for the study of such preliminaries.

The attempt to compare the three positions necessitates a greater precision in the idea of judicial inference if confusion is to be avoided. The historical use of the term has a varying scope. In the narrowest sense, judicial inference covers only a purely logical notion of legal reasoning — for example whether it is deductive or inductive. But there is no guarantee of this narrow scope even in logic. Conceptions of "informal reasoning" as patterns of premise-conclusion relation that are definite but varied, and not reducible to the traditional two major forms have been offered in contemporary British analytic ethics (7). And claims for "practical reasoning" as not reducible to the other types have been offered in the whole history of logic. It is sometimes possible to pinpoint the additional elements in the character of the premises employed. For example, Aristotle distinguishes demonstrative from dialectical reasoning by the type of premises — the former uses primary and necessarily true premises, the latter premises that are commonly held. Similarly, one could see in a concept of methods of judicial inference, such as Cardozo's further rules about the source of the premises — whether they are to be sought in precedents, in history, in custom, in judgments of social welfare. All such notions are to be carefully distinguished from genetic accounts of causal influence in the decision process; they are part of the analysis of the method of decision, as rules or instructions, and they are also analyzing the mode of justification, since they tell you where to appeal to justify your decision. In the long run, I believe that the notion of practical reasoning will have to be analyzed as a configuration of such elements as transformation rules, types of definitions employed, character and locus of premises (in well-distinguished dimensions), and so forth. In such a configuration, the place of values will no longer be regarded as intrusive.

The comparison of the models is more complex than at first might seem to be the case. It is not wholly clear what are the terms of their competition. On the face of it they seem to be different analyses of the place of values in judicial inference. But they are not all distinct; some of them may cover a part-whole relation. Again, how well-defined is the subject-matter of which they are asserted ? Is there only one real judicial inference for which they are competing analyses ? Or does judicial inference contain several possibilities with respect to its form so that they are different models which might conceivably fit the judicial process in different legal systems ? Or again, may they not in some respects be models offered in a normative way, for how judicial inference *should* be carried on ? These several alternatives do not fit neatly into anthropological description vs. logical analysis, or psychology vs. logic. It is rather that the context of the inquiry and the terms of its solution have not always been sufficiently determinate. In some respects it is like the traditional approach over the deductive vs. the inductive model. There arise initial arguments over whether induction is different from deduction or whether it can be construed as a special case in which some general premise is suppressed. Even if they are different, there can be a controversy over which model correctly describes what is going on in the development of a certain field; it may be readily settled in mathematics but be controversial (at some periods) in physics, or in learning theory in psychology. And it may merge with the normative issue of which model should be used in a given field, e.g. in law or history.

Almost all these kinds of problems arise with our three positions. It can be argued that each provides a model for the analysis of judicial inference with respect to the place of values, that one may be more basic than another by being a form of which that other is a special case, that one is correct as an account of how judicial inference in fact takes place while the other is incorrect at least in the sense of glossing over what actually happens or unavoidably happens, that the possibilities are normative models offering different ways of locating the impact of values which are genuine alternatives

so that issues of the advantages and disadvantages of each possibility are paramount.

With respect to these various questions, I want to suggest next that the third possibility regarded as a model for judicial inference is in one sense at least the most basic. It enables us to develop the richest and most general model, and to see the other patterns as special cases of it under special conditions of stability and change, of simplicity and complexity, in the human socio-historical field in which the law operates and to which it is applied. The third position — if it carries out its program — will furnish us with an inference-schema or inference-model in which the points where values enter are more or less clearly marked. To generate the other possibilities as special cases we have only to cross out some of the occurrences of the value-variables. This can happen under two conditions. One is to ignore a variable, which is possible where the value-content is so established and permanent as to be taken for granted. That is, there is no social change which brings it into question, and there are no complexities in application which generate controversy. The second condition is to move its content systematically somewhere else, when value pressure cannot be ignored. The example from Cardozo illustrates the first of these — since it ignores the value elements in the traditional methods that manage to work, presumably because of the relative stability of the embedded values and moderate simplicity of the situations. The case of administrative law illustrates the second, where a field that "intrudes" values is transferred to the administrative process. The first of our three positions represent an even more restricted case. A society would have to be so stable and simple that its aims for the law and for legal method could be stated separately and antecedently, and thereafter the law set on its independent non-value course.

The tolerance in this approach to the models is a calculated one. It recognizes the multplicity of perspectives from which such inquiries as we have been considering have been engaged in. Indeed the picture does vary from the position of judge, lawyer, client, law professor, general public, philosopher. Con-

ceivably one of the models might be a better working approximation for the lawyer, another a more profound framework for the philosopher. Presumably Cardozo's description may be correct for Cardozo's practice, but may be analytically limited for the historian of social change. Whether it is normatively too restricted for Cardozo's own time depends on the socio-historical analysis of Cardozo's time.

In general, it may very well be that nothing short of the fully conscious third model is appropriate for our time. For given the high complexity and the rapidity of social change, the field conditions appropriate to the other models simply do not hold. We require a consciousness of the full schema without ignoring any of the value-places because we cannot be sure in almost any question that we are not faced with the need for a far-reaching reconstruction of the desirable rules and procedures of the law, and even where no changes are required there may have to be a conscious reaffirmation of keeping things as they are. The burden of proof used to be on proposals of change; nowadays it is equally on the maintenance of the existing ways.

This does not mean that within some limited domains other possibilities may not be applicable — but as deliberate decision. For example, even the old-fashioned deductive model is not ruled out in this way. It is simply recognized that it is useful only where there are no difficulties in a rather automatic structuring of the case, finding the law, interpreting and applying it, and so on. This is rarely so but there may be restricted areas — automobile accident liability, for example — in which we may want deliberately to automatize and computerize decision.

These comments have been concerned with the type of inquiry and a program for evaluation. The actual evaluation is a much larger task. And there are many aspects which have not been raised. For example, there are the logical questions of the systematization of values and its impact in the map of value-places, how much redundancy there may be, what logical simplifications may be possible, and so on. In general, there has to be a greater coordination of what is going on in ethical

theory with the analysis of values from the point of view of legal philosophy.

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NOTES

(1) Minersville School District v. Gobitis, 310 U.S. 586 (1939).

(2) See volume IX of The Modern Legal Philosophy Series, *Science of Legal Method* (Boston: The Boston Book Company, 1917), especially the selections form GENY, EHRLICH, and BEROLZHEIMER).

(3) Cf. James M. LANDIS, *The Administrative Process* (New Haven: Yale University Press, 1938), especially Ch. IV.

(4) Benjamin CARDOZO, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921; paperback, 1960). Professor Beryl LEVY, in his *Cardozo and Frontiers of Legal Thinking,* rev. ed., (Cleveland: The Press of Case Western Reserve University, 1969), p. 60, equates the method of sociology with the method of ethics.

(5) See Karl Georg WURZEL, chapter on "Methods of Juridical Thinking" in the Modern Legal Philosophy Series, vol. IX, *op. cit.,* especially pp. 342-49.

(6) Cf. Morris R. COHEN, "The Process of Judicial Legislation" in his *Law and the Social Order,* (New York: Harcourt Brace, 1933).

(7) Cf. Gilbert RYLE, "Formal and Informal Logic", in *Dilemmas* (Cambridge University Press, 1956).