THE FRAMEWORK OF LEGAL DECISION-MAKING

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I

It is the purpose of this paper to identify and analyze the factors that determine judicial decisions and to which appeal is made in justifying such decisions. At the outset it is well to recognize that there may be a difference — and even a radical discrepancy — between the process through which a decision is reached and that through which it is explained and justified. The first of these processes is necessarily shrouded in mystery, sometimes even to the judge who engages in it: his decision may be based on an intuitive "feel" that this is the proper outcome of the instant case and the soundest guide to future judicial practice. But the second is a matter of public record, at least when judges issue written opinions, and is open to inspection and analysis.

When we examine this record, we soon discover that judicial reasoning takes place within an intellectual domain that spreads through four dimensions or contains four principal fields. I shall refer to this domain as the judicial context or framework ("le milieu juridique"). As we follow a judge's reasoning, we see him move back and forth along these dimensions, drawing material now from one field, now from another. And when we study his opinion, we find that he justifies his decision by setting it securely within this four-dimensional domain and showing that it is consistant with the present structure of each of these fields. I shall identify these fields as the *logical,* the *legal,* the *practical,* and the *moral.* I shall first examine these fields separately, indicating the role that each plays in judicial decisionmaking and noting especially the limitations they impose on the jurist and the opportunities they afford him for discretion and creativity. I shall then consider the conflicts the jurist must resolve, the compromises

he must effect, and the interests he must reconcile as he seeks to justify his decision from each of these points of view. Here we shall find that the true art of the jurist lies in selecting the right emphasis and making the right sacrifices as each of these dimensions seeks to dominate his vision.

II

First, and most obviously, "legal reasoning" is a mode of "reasoning in general". In reaching and justifying their decisions, judges employ the same techniques of investigation, inference, and argument as are followed in any other type of inquiry. Facts must be established and their relevance determined; these facts must then be brought under some legal category; the legal norms and principles that bear upon the instant case must be identified; from these general propositions, deductions must be made that will reach the concrete situation and indicate its disposition.

However, even this logical part of the judge's job is not nearly so mechanical as this account would make it seem. For there are two critical points at which this process becomes fluid and open, leaving it to the judge — and requiring of him — to make choices as to which direction he will pursue. One of these occurs in the selection of the facts that will be taken into consideration: rules regarding the admissibility of evidence and judicial cognizance are such that the judge not only can but must exercise a wide discretion in determining the grounds on which his decision will be based, the form it will take, and the range of situations to which it will apply. This is perhaps most apparent in trials in a court of first instance, but it is equally true, and more important, in courts of appeal and of last resort. The second lacuna or ambiguity that the judge must specify concerns the exact legal category under which the instant case is to subsumed. As has often been pointed out, legal reasoning depends very heavily upon the use of analogies. To which of several types of situation is the present one the most similar ? Is this a case of contributory negli-

gence, of failure to take due care, of assumption of risk, of extra hazardous use, or of still something else? So again the judge can and must choose which of these similarities is to be regarded as the essential and controlling one; and this choice does much to determine what his decision will be. In short, much of the judge's justification of his decision, as given in his opinion, consists of an explanation and defense of the factual elements and the legal categories that he has accepted as settling the case before him.

But legal reasoning is more than an exercise in formal and material logic. It is subject to other influence than logical ones, and it aspires to more than validity. Its aims are concrete and practical, and it means to govern individual behavior and social structure. This is to say that legal reasoning takes place in a larger context, and its course is highly sensitive to the elements that constitute this context. Stated differently, if legal decisions are to be effective as well as correct, they must take account of the other three fields or dimensions that compose their domain.

In the first place, legal reasoning is carried on within the context of an already established legal system. There is present a body of substantive and procedural law with which the decision must be consistent — into which it must be fitted and from which it must be shown to follow — if it is to be justified. The judge must be faithful to the legal apparatus of which he is the agent, otherwise he threatens to disrupt its fabric with arbitrary and erratic decisions. Yet at the same time he must adapt to the particularities, the novelties, and the changes that his decisions constantly confront. The challenge of conforming to these double demands is at the root of most of the familiar dilemmas that legal reasoning faces, such as the rival claims of stability and change, freedom and order, equality and justice, property and person. The judge can deal with these paradoxes only because the legal system within which he acts has a wide extension, both horizontally and vertically: there are alternative precedents and statutes amongst which to choose; and he can ascend from these toward more general principles and constitutional provisions. The judge justifies his decision legal-

ly by showing that it follows logically from those enactments that control the situation he is dealing with. This matter was well put by the Supreme Court of the United States in the leading case of *Home Building & Loan Association v. Blaisdell* (290 U.S. 398). The court there said: "... we must consider the relation of emergency to constitutional power, the historical setting of the contract clause, the development of the jurisprudence of this Court in the construction of that clause, and the principles of construction that we may consider to be established".

In the second place, legal reasoning takes place within an actual social milieu and physical environment. The decision that is the outcome of legal reasoning is intended to initiate action and thus to affect a change in human behavior and the social situation: it is the conclusion of one process but the beginning of another that is even more important. So the jurist must recognize the human, social, and physical realities that he faces, taking full account of the obstacles these pose and the possibilities they offer to the results he aims at. A legal decision must be relevant to the actual circumstances that it means to affect: it cannot achieve more than conditions will yield and it must be adequate to what these conditions demand. So a judge must be sensitive to time and place, tailoring his decisions to current needs and problems. His decision is practically justified when it gives to the course of events a direction that meliorates present difficulties and obviates their future occurrence.

Finally, legal reasoning is carried on within a specific moral climate. A judge finds his society committed to certain values, pursuing certain purposes, and following certain customs; and since he is the servant of society, both principle and practice require that he honor these. But a judge serves justice as well as society: it is inherent in his calling to challenge society to become what it ought to be. Judicial decisions are inevitably caught up in this tension between the values and criteria that ethical theory ideally imposes and those that its society actually honors, and they must be responsive to both. A judge need be wary of imposing his own tastes and standards upon society; but he cannot escape the responsibility of holding

society to the full meaning of the goals that it proclaims. In this context, the task of the judge is to move society closer toward the realization of its ideals without rupturing the delicate fabric of custom. To the extent that he succeeds, his decision is morally justified.

III

These are the elements that enter into the making of legal decisions and by reference to which these decisions are justified. As we have seen, each of them imposes a very real constraint upon judges. A judge cannot ignore the principles of reasoning, defy the established substantive and procedural law, fly in the face of human and social facts, or flout the ethical ideals and moral practices of his society. But again as we have seen, each of these fields is to an appreciable degree open, fluid, and ambiguous, offering the judge room to maneuver.

I doubt if anyone will ever know exactly what determines an individual judge to reach a particular decision in a specific case: too many factors — personal and public, extraneous and intrinsic, accidental and essential — exert their influence, and the process through which these combine to force an outcome is too subtle and subterranean. But the general structure and course of the process are clear. The judge regards the case before him from each of these perspectives — logical, legal, practical, and moral — and seeks to fit it properly into each of these fields: he tries it against the various analogies and categories that appear available; he looks for the relevant laws; he estimates the feasibility and impact of different outcomes; he measures the individual and social values that are at stake. Frequently the view from one or two of these perspectives will completely dominate the judge's attention and determine his decision: I would suppose that in lower courts logical and legal considerations are largely controlling. But the practical and moral perspectives are always present to the judge, if only in the guise of prejudices, stereotypes, and in-

clinations; and it seems apparent that in higher courts — especially those of last resort — these four dimensions come into the picture on equal terms.

It is from this four-fold consideration, partly explicit and partly implicit, that a decision precipitates. It is certainly not the case that the judge's justification of his decision, as contained in his opinion, is a purely ex post facto exercise, a mere rationalization of what was really an intuitive leap in the dark. Judges scrutinize, consider, weigh, and deliberate in good conscience and with clear mind. In all probability, the general tenor and bearing of the decision does appear at an early stage of this process and without the judge being able to say how he arrived at it. He simply feels that a certain outcome is the proper one. But the final form of the decision is the result of conscious and careful work, in the course of which the original rough decision is refined and modified, sometimes to the point of reversal. Throughout this process of deliberation and justification the judge considers various interpretations of the facts, different applications of the law, competing social claims and interests, and conflicting values and ideals. Sometimes the diverse elements of these diverse fields coalesce smoothly to form a closely knit and beautifully coherent decision. More often, unresolved tensions remain to the end. Then the judge must decide where the balance lies: with logic, the law, social conditions, or ethical ideals. Having done this, he must bring the other claimants to heel as best he may. The sensitivity with which he decides, and the tact wih which he reconciles the rejected rivals, measure his greatness as a judge and the influence that this opinion will have.

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