ON JUSTIFICATION OF JUDICIAL DECISIONS: SOME AMERICAN CONTRIBUTIONS

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In considering the justification of judicial decisions I am focusing on a function of a final court of appeals reviewing a question of law. In the United States such a final court would be the court of last resort in one of the states of the union. The law of the state is determined by the highest court of the state. In American legal theory we have been accustomed to follow Gray and Holmes in identifying the locus of law in the court. A judicial decision is an act performed by one who occupies the office of judge. If a judge is asked to justify his decision, he must refer to the court practice, which is the stage-setting of his decision (See Rawls, "Two Concepts of Rules", 44 *Philosophical Review*, 1955). Appellate courts are always multijudge courts, thereby precluding a single individual's idiosyncrasy.

I am limiting myself to a question of common law, leaving aside questions of constitutional law and statutory interpretation, which have special features. I shall assume that there is no question of fact involved but purely a question of law. (Sometimes cases are indeed appealed on an agreed statement of facts.) In a common-law case, the question of law arises when the appellate court is passing upon some rule of law deemed to govern the instant case. In the common law system, the standard practice in resolving a question of law is by reference to precedents; that is to say, to rules presumed to be embodied in cases previously decided. I say "deemed" and "presumed" for reasons which will hereafter appear, but it can be observed at the outset that a rule of common law, unlike a statutory provision, is not *in haec verba* but is subject to verbal reformulation from case to case.

The court has a Siamese twin function. The court must decide a dispute between the parties and, coincident with this decision, must justify the decision in an opinion. The opinion gives the

rationale for the decision, the grounds accounting for it, an exposition of the reasons which justify it.

In a routine case the court may sometimes forego the justifying opinion. In any non-routine case, involving a serious question of law, court practice requires the court to prepare an opinion. The court cannot shirk the duty to decide the case. Nor can the court refrain from writing an opinion. Court practice does not permit a court to stand on what Fuller calls "fiat". In whatever way a court may have arrived at its decision — whatever inquiry or lucubration may precede what Hutcheson calls the judicial "hunch" — the justification for the decision can never be mere whimsy. Judicial practice proceeds upon the assumption that the court will attend reflectively to the argument made by each party in an effort to persuade the court in its behalf. The argument will contain precedents but will rest on more than a mere citation of precedents. The same is true of the court's opinion. To justify its decision the court's opinion undertakes to persuade the parties as well as the legal community and the general community that the decision is sound. Thus, as Scheffler says, when we speak of justification, we speak of what is warranted, valid, right. To be responsible for something is to be subject to the demand for its justification ("On Justification and Commitment" 51 *Journal of Philosophy* 180). "When we ask a person to explain why he did something", Ladd puts it, "we are usually requesting him to give a reason for his action which operates, as it were, to justify the action. Thus explanations of past actions ... typically take the form of a justification. Such explanations may be called *justifying explanations*" ("The Place of Practical Reason in Judicial Decision", in *Rational Decision*, p. 134). Hence we are here concerned with the components of a sound and correct opinion, one which adequately justifies the decision. That the justification can never be absolutely correct is obvious for the reason long ago given by Aristotle, that we must be content with the degree of certainty appropriate to the subject matter and, unlike the mathematician, we must settle for approximation. Nonetheless we should like the opinion to be as reasonable as possible. The law is a practical enterprise and in using the term

"reasonable", rather than "rational" I am following a common dictionary distinction between them, which explains that "*reasonable* has taken on more and more the pragmatic idea of simple common sense" while "*rational* is the more technical or abstract term ... applied to statements which reflect or satisfy highly logical thinking" (*American College Dictionary* whose logic consultant is Ernest Nagel and whose law consultants include Lon Fuller and Max Radin). A mastery of logical theory is not required or expected of legal practitioners or judges. It is not a prerequisite for admission to a law school or the bar or elevation to judicial office. It is not necessary to study the discipline of logic to think logically. When Holmes said that the life of the law was experience, not logic, he obviously meant that decisions cannot be made by simple syllogistic deduction from a rule of law as a major premise. He was certainly not deprecating a reasoned opinion. In a letter to Laski he remarks of one of his dissenting opinions: "I do not expect to convince anyone as it is rather a statement of my convictions than an argument..." (1 *Holmes-Laski Letters* 68). As Stuart Hampshire points out, conventional logic text-books do not provide the patterns of all forms of reasoning habitually used outside the sciences (See "Fallacies in Moral Philosophy" 43 *Mind* 1949).

Over the centuries many precedents have accumulated and, in our complex society, nowadays they often conflict. At the very least they require interpretation. Among other things they afford the option of narrow or broad construction. Justice Douglas has observed that there are now so many precedents that one can be found on practically every point, — a bit of arch-realism not alleged as a ground for his impeachment. We are positing a situation of multiplex precedents, for otherwise we would not have a serious question of law reaching the highest court. No one today any longer holds to the naive view that, in such a case, all the court has to do is match the facts against a simple rule, like matching samples to a color chart. For our serious case (characterized by Dworkin as the "hard" case) we require a demonstration that the invoked precedents are applicable to the instant state of facts; that the decision

is a just adjudication; and that it is one which accords with the needs of the times. The problem is a highly complex one for precedents (or lines of precedents) must be realigned and rendered applicable to the instant facts, which are never exactly like the facts in the precedent cases; the fairness of the decision must be shown not merely, or even mainly, for the litigating parties but for all those similarly situated; and the rule may require refurbishing to meet contemporary social changes.

The complexity of the problem is intensified by the consideration that the court is, not untypically, faced with the necessity of passing upon a conflict of rules in the lower courts, — a conflict which the final court must resolve. Thus it must decide the dispute and, at the same time, settle the law of the state. In order to settle the law of the state, the court might have to make a decision which is not as fair as it should be to one of the parties. "One man is made a victim to the extent of a few dollars", Judge Cardozo confesses, "for a readjustment that will save many victims in the future". This neglect of the just claims of the litigating party is no light oversight, as Cahn and Jones have been at pains to point out, especially in a criminal case where the fate of a human being may be sacrificed at the altar of legal definitiveness. But the appellate court (unlike the trial court where this factor is more germane) is not in an existential "I-Thou" relation to the party, whom it does not even see, since only the attorneys appear at the appeal. The appellate court may even be under a mandate to exercise the function of settling the law of the state, as, for example, in the Constitution of New York which imposes this explicit duty. This intensification of the problem thus arises because the court must treat the case as an instance of a general class of cases (of a type of situation), as to which the court proposes to lay at rest doubt concerning the applicable law for all those persons who might be involved in such a recurrent situation and need to know their legal rights.

Overall, therefore, the court is not only dealing with *past* decisions in the precedents, but with the justice of the *present* decision, which entails a generic social problem which has generated patterns of conflict as to which the court seeks to

provide guidance for the *future*. (See Llewellyn, *The Common Law Tradition — Deciding Appeals* for ramifications of this perspective which he calls the Grand Style).

Three significant implications flow from this understanding of the problem. (1) The court is not confined to a closed system of rules. (2) The court engages in an inventive, socially-oriented activity. (3) The problem is exacerbated by the necessity of deciding the case and, simultaneously, clarifying the law.

1.

There must be general rules of law if law is to apply to the whole community or whole groups in the community. Despite the rule scepticism of the Realist revolt, in the 30's, against the preponderant concentration on rules of law, there has latterly been a reversion to rule preoccupation, reflected in the recrudescence of analytic positivism through the Oxford influence of H. L. A. Hart. In English and American common law it is easy to confuse law with rule of law since the word "law" is used in a double sense for which all other languages have two words: *loi* and *droit, recht* and *gesetz, lex* and *ius*. Thus Wasserstrom in his recent book on a theory of legal justification conceives of justification in terms of rules by strict parallel with the ethical theory of restricted utilitarianism. The case is considered an instance of a rule which is justified by the satisfactions it yields.

Dworkin, a critical American admirer of Hart, has recently urged a break away from a rule-bound theory, even one like Hart's which concedes an "open texture" to rules and admits a role for judicial discretion. Dworkin has emphasized the legitimate role of wider standards for decision which he calls "principles", — such as, that a man may not benefit from his own crime. Such principles are not concretized in any precedent-derived rule but are "dimensions of morality". (Dworkin, "The Model of Rules", 35 University of Chicago Law Review 35). Thus the court, for example, will set aside a legacy to an heir who has killed the testator in order to collect the

fortune, notwithstanding the rules concerning the validity of a will.

Wechsler's recent caveat may be seen in the same context: that any rule of law should itself be subject to the principle of neutrality in the sense that it must be equally applicable to gose and gander, banker and radical, black and white, Nazi and American. But Wechsler explicitly realizes that this is only a minimal consideration, a necessary and not a sufficient one, which does not take account of what fully constitutes a sound opinion, one which is in accord with ideals sought to be achieved. His reminder is in line with the Socratic insistence, basic to our civilization, that justice is not the interest of the stronger.

It is with Judge Cardozo that we get the broadest account of an opened-up system. "I find lying around loose ...", he writes, "a vast conglomeration of principles and rules and usages and moralities. If these are so established as to justify a prediction with reasonable certainty that they will have the backing of the courts ... I say that they are law". (55 Report of New York State Bar Association 276).

2.

Cardozo pricked out four guiding threads in justifying a decision; *viz.*, precedent, history, custom, and social morality. He thought that, though one started with a precedent presumption in the usual case, one ought to take recourse to history in real property cases, for example; to custom in sales cases, for example; and to social morality in such cases as labor cases and anti-monopoly cases, where there is a patently broad social involvement. What has turned out to be most influential in his analysis is the emphasis on the last of these, which we can discern to be more and more infiltrative in cases decided since his day by the New York Court of Appeals of which he was chief judge. Thus, for example, a generation ago, the court decided to exempt charitable hospitals from the ordinary liability of an employer for the negligence of its employees

when the employee is a doctor, on the theory that doctors are not ordinary employees but independent professional men, with the further implication that charitable hospitals could not sustain the financial burden of such liability. The Court of Appeals in recently reversing that rule, in the *Bing* case, took recourse to the social realities: the confident reliance people actually place in the hospital itself for adequate medical service, the development of business-like methods for running hospitals, the availability of community funds (not just desultory donors) for financing charitable hospitals, the availability of insurance to cover risks of medical malpractice. It was quite evidently these social considerations which led the court to reverse itself and to place liability upon the hospital for any negligence of their doctors, without over-preoccupation by the court with the technical question of legal doctrine as to whether a doctor is more like an independent contractor or more like an ordinary employee who is an "agent". These social factors are frankly and fully set forth as justifying grounds for the decision in the opinion of the Court.

Thus we perceive a socially-oriented, inventive role being performed by the court, with changes in social trends and social conditions serving to move the court to a new legal position. It seems quite likely that this method of justifying a decision will continue to grow in use and prestige. I have here called it the method of social morality as more adequately descriptive of Cardozo's thought than his own label for it, the "method of sociology"; and I would make a distinction, as he did not, between merely mirroring significant social tendencies and choosing among them on the basis of some criterion of ethical value.

The insight of Edward Levi brings social attitudes and changes into confluence with precedent theory. This liaison is achieved through identifying the basic pattern of legal reasoning as reasoning by analogy through comparison of cases; and then viewing the cases as themselves reflections of social conflicts which have been resolved. Aristotle in the *Prior Analytics* had singled out reasoning by example, from part to part, as distinguishable from reasoning from part to whole or

from whole to part. In the law we reason from case to case with the rules being remade as they are applied from case to case. When competing cases are presented by the parties not only the views of the party but those of the community are represented. Not only the litigants have participated in the decision but all citizens have vicariously participated in a rule which will be law for them. The margin of ambiguity permits the infusion of new wants as new needs arise and new claims are made. The law continues to be followed as it continues to be changed. As Cohen and Nagel observe: "That the law can be obeyed even when it grows is often more than the legal profession itself can grasp". This growth is incremental and non-dramatic ("interstitial", Holmes called it). Traditionally it has taken place almost imperceptibly beneath a facade of logical form. But now that the process has come to be better understood, through the writings of Holmes, Cardozo, Llewellyn, Frank, and Levi, the social dimension has become more and more explicit as in the *Bing* case. Thus precedent theory and needed social advance are brought into a smoother and more conscious rapport. The inventive and socially-oriented aspect of the opinion becomes more candid and emphatic.

No judge will predicate his opinion on a purely subjective basis and yet it is acknowledged by judges of great experience, scholarship and prestige, as recently by Judge Clark and Judge Friendly, that there is necessarily a vestigially personal element in a judge's decision by virtue of his distinctive background and education, not to mention subconscious influences. As Bertrand Russell has remarked: "No one can view the world with complete impartiality; and, if anyone could, he would hardly be able to remain alive". While one might not wish to go the length of Jerome Frank in urging that all judges be psychoanalyzed, the justification of a decision would be enhanced if judges tried to spell out their predispositions and their efforts to discount them.

3.

Since the decision affects social patterns of behavior, of which the parties before the court are an illustration, the court must weigh still another factor when entertaining the prospect of a shift in the law. What about those who have conducted themselves or their business in such a way as to rely on the previous rule and who will now bear an unforeseen loss if the rule is changed ? How much weight must be given to this countervailing factor when the court is seeking to update an archaic rule which suffers from a social lag ? We know from many opinions and dissents that this consideration often carries great weight, sometimes sufficient to deter the court from making a needed change. It is here that we suffer grievously from the integral tie-up of the decision and the justifying opinion which must also expound the law for future guidance. If the particular case could be decided on its merits, with the guiding rules to be non-retroactive, we should have cut the Gordian knot. But are Gordian knots ever cut and shall we be tempted into contemplation of so sensible a simplification ?

The answer is "yes". The fact is that in recent years there has already emerged prominent emphasis upon the device of what may be called "prospective overruling". Prospective overruling occurs when a court overrules a precedent, but limits the customary retroactive sweep of its decision. Prospective overruling may take the form, for example, of deciding the instant case in accordance with the old rule and announcing in the opinion that thenceforward a new rule will obtain, thereby serving due warning of the forthcoming change on those who have been relying on the old rule. The U. S. Supreme Court has held that this device may be used without denial of equal protection of the law to the losing party. There have already been variations of this formula such as stating the new rule instead of merely the dictum of announcing a new one as forthcoming. There has also been the immediate application of the new rule to the litigating parties but limiting it only to events after the decision and cancelling out its ordinary retroactive effect. The advantage of the last variant is that it

gives the litigating party the incentive to seek a needed change in the law since he will benefit by it, even if it is not retroactive as would ordinarily be the case under the traditional Blackstonian view that the court does not initiate but merely declares, like a phonograph, what really all along was the law.

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In recapitulation, we note that in the United States recent legal theory and judicial practice indicate (1) that the legal system is not an insulated rule-bound chamber; (2) that precedent doctrine is modulated by social reasons for formulating the law afresh; and (3) that the need for ease and flexibility of change, in a rapidly changing society, is facilitated by severing justification of the decision from justification of the guiding rule of law. Justification of appellate decisions has gained perspective and respect in transcending rigid legal rules, in maintaining social relevance, and in facility of change without prejudice to the claims of reliance.

These are some of the strains in philosophic discussion of judicial decisions in America in recent decades which seem to me most noteworthy in framing a theory of justification. As a result of earlier critical suggestions that rule theory does not sanction precedent worship, that judges are not automatons, that decision and opinion need not be umbilically tied, we have now emerged with a clear and candid recognition that justification of a decision goes beyond explication of precedential rules, accepts the role of the judge as partial legislator, and concedes the sometime appropriateness of severance of decision and rule.

In this century legal philosophy in America has achieved a new plateau in this emergent conception of the components of justification of an appellate decision. This achievement represents the combined contributions of legal realists in bringing theory into accord with actual practice, the natural-law tradition in bringing practice into conspectus with social ethics, and

the positivist approach in clarifying the internal structure of the legal system.

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